# In the public interest or out of desperation? The experience of Australian whistleblowers reporting to accountability agencies

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## Statement of originality

This is to certify that to the best of my knowledge, the content of this thesis is my own work. This thesis has not been submitted previously, either in it entirety, or substantially, for a higher degree or qualification at any other University or institute of higher learning. I certify that the intellectual content of this thesis is the product of my own work and that all the assistance received in preparing this thesis and sources have been acknowledged.

Lindy Annakin

‘Fear not the path of truth for the lack of people walking on it.’

Robert Kennedy - from his last speech, 5 June 1968

## Abstract

Whistleblower protection legislation in Australia has three objectives: (i) to facilitate the making of disclosures about public interest wrongdoing in government departments, (ii) to ensure such disclosures are properly dealt with, and (iii) to ensure the protection of whistleblowers. These objectives align with the three core purposes of accountability: reporting information, justification and debate, and the rectification of any wrongdoing.

Using empirical data collected by a national research project, 'Whistling While They Work', this thesis analyses the experiences of whistleblowers who make their disclosures to external accountability agencies - auditors-general, ombudsmen, corruption and crime commissions and public sector standards.

The whistleblowers in this study reported wrongdoing to their own departments, out of loyalty to their organisation and trusting that their managers shared their ethical values and commitment to integrity. Only when this trust was breached, did they make their disclosures to external accountability agencies in the hopes of achieving rectification of the wrongdoing and protection from reprisals.

The focus of the analysis is on the extent to which accountability agencies are achieving the objectives of the legislation. The fundamental conclusion is that they are not.

Resource constraints and problems with the legislation itself, particularly the 'public interest' threshold test, clearly contribute to agencies' limited achievements. In large part, however, accountability agencies have failed to develop approaches to whistleblowing that take into account the needs and vulnerabilities of whistleblowers. Accountability agencies trust the 'distributed integrity' in government departments in the same way as they do for other areas of their work, for example, complaints from the general public. In doing so, they fail to use the many-faceted experience of whistleblowing to improve accountability. All too often, they simply confirm whistleblowers' disappointment in the standards of ethics and accountability within the public sector.

# Table of Contents

List of Tables v
List of Figures vi
Acknowledgements vii

**Chapter 1 Introduction 1**

**Chapter 2 Theoretical approach and methodology 11**
Introduction 11
An accountability framework 14
The core concept of accountability 14
Who is accountable and to whom? 15
For what? 17
And how? 21
The purpose of accountability 22
Trust and loyalty 25
Conceptualising 'trust' 26
Trust and ethics in public administration 28
Loyalty in organisations 30
Remedies for breaches of trust and loyalty 31
Accountability agencies and integrity systems 32
'Core' accountability agencies 34
An integrity system 38
Whistleblowers 44
What is whistleblowing? 44
The role of whistleblowers in accountability/integrity systems 48
Reprisals and retaliation against whistleblowers 51
Methodology 53
Data collection 54
Quantitative and qualitative analysis 59
Scope and limitations 60
Conclusion 64
**Chapter 3 Establishing external reporting paths 67**
Introduction 67
Queensland - Whistleblowers Protection Act 1994 70
Background to development of whistleblower protection 70
Parliamentary debate 73
Provisions of the legislation 80

Analysis 81
New South Wales – Protected Disclosures Act 1994 83
Background to development of whistleblower protection 83
Progress through NSW Parliament 85
Provisions of the legislation 94
Analysis 95
Western Australia - Public Interest Disclosure Act 2003 97
Development of the legislation 97
Parliamentary debate 98
Provisions of the legislation 103
Analysis 104
Conclusions 105
**Chapter 4 Implementation of the legislation: roles of accountability agencies 109**
Introduction 109
Departmental procedures 112
Ombudsmen 115
Ombudsmen's offices: annual reports 116
Ombudsmen's offices: websites 121
Analysis of the quality of information provided by ombudsmen 123
Corruption/Crime Commissions 124
Corruption/crime commissions: annual reports 124
Corruption/crime commissions: websites 129
Analysis of the quality of information provided by Corruption/Crime Commissions 130
Auditors General 131
Auditors General: annual reports 132
Auditors General: websites 136
Analysis of the quality of information provided by Auditors General 138
Public Service Commissions 139
Public Service Commissions: annual reports 139
Public Service Commissions: websites 143
Analysis of the quality of information provided by Public Service Commissions 143
Conclusions 143
**Chapter 5 Reporting wrongdoing 147**
Introduction 147
Reporting paths: a quantitative framework 148
Identifying wrongdoing 151
Reasons for reporting 153
Accidental reporting 155

Being required to give evidence 155
Tipping points 156
Delaying reporting 157
Collecting sufficient evidence 158
Trying direct resolution 159
Implicated in wrongdoing 161
Reporting internally 162
Naivety or misplaced confidence? 164
Risk and needing to trust as opposed to confidence 166
Protecting oneself or one's colleagues 168
An eye to the future: estimating risk 169
Reporting externally 172
Being sufficiently well informed 173
A last resort 174
Reporting again 177
Doing it differently next time 180
Conclusions 183
**Chapter 6 Responding to reports of wrongdoing 187**
Introduction 187
Whistleblowers' expectations 190
Quantitative data: levels of satisfaction 190
The bar set high 194
Issues within accountability agencies 197
Accountability agency priorities 197
Avenues of last resort 200
The adequacy of assessments 201
Accountability agency investigations 203
Distributed integrity in practice 210
Referrals back to departments 211
Confidentiality 218
Coordinated oversight 222
Conclusions 225
**Chapter 7 Outcomes from reporting wrongdoing to accountability agencies 229**
Introduction 229
Assessing the contribution of accountability agencies to public administration 230
The value of whistleblowing 232
Supporting whistleblowers 235
Reprisals 238
Predictors of reprisals 239

Frequency of reprisal 240
Types of reprisals 242
An external viewpoint 247
The handling of reprisals by accountability agencies 250
Limited support and protection 255
Improving ethics and accountability 256
Outcomes of disclosures 258
Using whistleblowing to impact on departmental culture 266
Conclusions 270
**Chapter 8 Conclusions** **273**
Introduction 273
Findings and themes 274
Further research 282
Recommendations 283
**Bibliography** **285**
**Appendices**
Appendix 1 Whistleblower interview schedule 307
Appendix 2 Manager and case-handler interview schedule 308
Appendix 3 Consent form 311
Appendix 4 Information sheet 312
Appendix 5 Support 314

# List of Tables


| | | |
|---|---|---|
| Table 2.1 | Interviews with whistleblowers, departmental managers and case-handlers | 58 |
| Table 4.1: | The adequacy of information published by Ombudsmen | 116 |
| Table 4.2: | Protected disclosures received by NSW Ombudsman – ten year comparison | 120 |
| Table 4.3: | The adequacy of information published by Corruption/crime commissions | 124 |
| Table 4.4: | Whistleblower complaints dealt with by the Crime and Misconduct Commission 2002-04 | 126 |
| Table 4.5: | The adequacy of information published by Auditors General | 131 |
| Table 4.6 | Protected disclosures made to the NSW Auditor-General 2002-04 | 133 |
| Table 4.7: | The adequacy of information published by Public Service Commissions | 139 |
| Table 4.8 | Assessment of information published by accountability agencies and numbers of disclosures received | 145 |
| Table 5.1 | Identifying wrongdoing (Internal Witness Survey) | 152 |
| Table 5.2 | Reasons for reporting | 154 |
| Table 5.3: | Reasons for delaying reporting | 158 |
| Table 5.4: | Estimates of reporting paths by accountability agency case-handlers | 172 |
| Table 6.1 | Levels of satisfaction – with outcome of first report | 191 |
| Table 6.2 | Levels of satisfaction – with outcome of subsequent report | 193 |
| Table 7.1 | The relative importance of mechanisms for bringing wrongdoing to light: accountability agency case-handlers | 233 |
| Table 7.2 | Type of information provided to accountability agencies | 234 |
| Table 7.3 | Reasons for lack of substantiation of reprisals | 249 |
| Table 7.4 | Whistleblowers' satisfaction with process and outcomes | 258 |
| Table 7.5 | Outcomes of disclosures to accountability agencies | 259 |

# List of Figures

Figure 5.1 Reporting paths of public interest whistleblowers: Employee Survey 149

Figure 5.2 Reporting paths of public interest whistleblowers: Internal Witness Survey 150

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# Chapter 1 Introduction

> Our lives begin to end the day we become silent about things that matter. (Martin Luther King)

It is often difficult to speak up about the things that matter. We fear being wrong or being misinterpreted. We fear that telling our personal truth will make things more difficult, that we will be seen as odd or that we will be punished. And all these responses are possible. As Robert Kennedy said:

> *Few men are willing to brave the disapproval of their fellows, the censure of their colleagues, the wrath of society. Moral courage is a rarer commodity than bravery in battle or great intelligence. Yet it is the one essential, vital, quality for those who seek to change a world which yields most painfully to change.* ('Day of Affirmation' Speech, University of Cape Town, June 6, 1966)

The subject matter of this thesis is a group of individuals who choose speaking out and demonstrating moral courage over silence. Its subject matter is Australian public sector whistleblowers, departmental employees who witness and report wrongdoing in their work place. While relevant, the focus is not the truth or otherwise of what these whistleblowers disclose. That they choose to speak out is what is important. Neither are their personal stories the main topic, although their experiences are an essential component of the analysis. Whistleblowing is not an end in itself. In this thesis the importance of whistleblowers is their unique contribution to accountability.

Accountability is one of the theoretical concepts central to this thesis. It is a contested topic and the focus here is tightly drawn on core elements and attendant regulatory frameworks relevant to public administration in Australia. The four elements or questions that define accountability relationships are: who is accountable, to whom, for what and how? (Mulgan 2003). Thus defined, accountability involves external scrutiny by an individual or organisation who has the authority to require and scrutinise the account that is given, and the possibility of remedies or sanctions. It has as its core purpose not only institutional control and answerability, but also encouraging individuals to develop a sense of personal responsibility for ethical behaviour and effective performance.

Whistleblowers who speak up to reveal wrongdoing in order to have someone held to account are operating as a key accountability mechanism. This role is increasingly recognised (Smith 2010, Brown *et al* 2008, Rehg *et al* 2008, Mulgan 2003, Bovens 1998, Near and Miceli 1995) and is the aspect of whistleblowing which is the subject of this thesis. There is still a lot to learn about what works and how to maximise the opportunities offered by whistleblowers.

There is much writing on the nature of whistleblowing and whistleblowers, and particularly the implications of reporting wrongdoing. Much of the research has been conducted in America and focuses on whether the reprisals suffered by whistleblowers are more pronounced when they make public rather than internal disclosures about organisational wrongdoing (Miethe 1999, Near and Miceli 1986). Whistleblowing is not only an accountability mechanism in terms of the disclosure of information. It also provides an opportunity to promote organisational cultures based on shared ethical values and standards that recognise the value of whistleblowers and the personal moral agency they demonstrate. Any failures to respond appropriately to the alleged wrongdoing and any reprisals against whistleblowers for making a disclosure, 'shooting the messenger', are in themselves integrity breaches that need to be resolved.

The need for legislative protections for whistleblowers is not a new idea. The earliest law protecting whistleblowers was the *False Claims Act*, passed in 1863 during the American civil war, which entitled whistleblowers to a cut of financial savings made by the government as a result of the disclosure of the selling of defective guns and munitions (Calland and Dehn 2004:15). However, as a subject warranting serious consideration in its own right, whistleblowing did not come to prominence until the 1970s. The release of the Pentagon Papers and then Deep Throat's revelations about the Nixon administration brought widespread attention to the issues raised by the release of information about wrongdoing by internal witnesses. This coincided with what Westin describes as '*dramatic changes in social attitudes toward the conduct of corporate affairs*' and '*a new sense of activism and personal moral commitment which grew out of the civil rights, antiwar, consumer and student protest movements'* (1981:6-7). A raft of legislation was passed in America from the 1970s onwards protecting whistleblowers

from retaliation in various situations. Legislation in many other countries was adopted in the late 1980s and early 1990s.

In Australia, legislation was first passed in Queensland, New South Wales and the Australian Capital Territory in 1994, with other States and the Northern Territory following suit over the next decade or so. This thesis focuses on the whistleblower protection schemes enacted in Queensland, New South Wales and Western Australia because these jurisdictions are comparable in terms of government structures, legislative powers and departmental roles focused on service delivery.

While Australian legislation differs significantly in its names, structures and specific provisions, the aim in all cases is fundamentally the same: fostering organisational cultures which recognise the contribution of whistleblowers to accountability. There are three core objectives: (i) to facilitate the making of disclosures about public interest wrongdoing in government departments, (ii) to ensure such disclosures are properly dealt with, and (iii) to ensure the protection of whistleblowers.

In each jurisdiction, whistleblowers are protected when they report wrongdoing within their department, internal disclosures, and when they report externally to nominated authorities. In each jurisdiction, identified authorities include the generalist oversight agencies which are part of the existing integrity system – ombudsmen, auditors-general and corruption/crime commissions. Whistleblower protection legislation recognises the roles of these agencies in promoting high standards of conduct in public administration and they are envisaged as supporting departments in achieving the objectives of the legislation. Oversight agencies are another key element of the public sector accountability framework in Australia. Their use by whistleblowers should therefore offer significant opportunities for strengthening accountability in public administration.

There is little in the way of academic writing on the achievements of oversight or accountability agencies. In Australia, the most significant work began with the National Integrity System Assessment (NISA) conducted in 1999-2005. This work did not focus on the roles and impact of individual, or even types of, accountability agencies but rather on their function as ‘core’ integrity institutions in a system where ‘distributed integrity’ resides within all public sector departments and agencies (Brown and Head 2004).

No research to date has focused specifically on the role of external oversight or accountability agencies in protecting whistleblowers or their use of disclosures to promote ethics and accountability in public sector departments. The research question addressed by this thesis aims to contribute to this knowledge. It is:

> *Are external accountability agencies achieving the aims of the whistleblower protection legislation in their jurisdiction?*

The answers to this question are developed through analysis of empirical data collected as part of a national research project, '*Whistling While They Work: Enhancing the theory and practice of internal witness management in the Australian public sector'* (WWTW). The extensive quantitative data collected through a range of WWTW survey instruments have been used to identify broad patterns of, for example, the ways in which whistleblowers report, the reprisals they experience and their levels of satisfaction with the outcomes achieved as a result of their disclosures. Within the quantitative framework, the meaning of whistleblowers' behaviour and experiences is investigated more deeply through the use of qualitative data obtained by way of interviews with whistleblowers and with departmental staff who have dealt with disclosures. A unique perspective on whistleblowing is provided by accountability agency case-handlers, and this data is used to balance or contextualise the views and experiences of whistleblowers and staff of public sector departments.

The complexity of the picture developed in this thesis offers new insights into the importance of trust in accountability relationships. Trust is the second theoretical concept that is central to this thesis. It is a three part relationship: the 'truster', the 'trustee' and the context within which trust is conferred (Levi 1998, Hardin 2006). Needing to trust implies that there is a risk: the truster may expect the trustee to respond positively but is vulnerable to the possibility that the trustee does not. The capacity to trust is generally learned from previous interactions and generalisations about future action (Kramer 2006, Hardin 2006). This is true both of interpersonal trust and organisational trust. Organisational trust is based on an understanding of the role and purpose of an institution, its reputation and reliability, and in some instances interactions with its representatives (Braithwaite 1998, Hardin 1998, Levi 1998). Organisational cultures based on shared ethical standards which foster accountability

and personal responsibility increase the trustworthiness of the organisation (Braithwaite 1998, Weaver 2006).

Trust in those to whom they make a disclosure of wrongdoing is important to whistleblowers. They show a distinct preference for reporting wrongdoing within their own departments and trusting that management will respond appropriately, operating out of a belief in, and loyalty to, shared organisational values and ethics. There is strong evidence that whistleblowers do not report to external accountability agencies unless this trust and loyalty is breached, and either there is insufficient response to their disclosure, or they experience reprisals as a result of reporting. There is little evidence that accountability agencies promote their role as an alternative avenue for protected disclosures but rather rely on existing reputation and the assumption that whistleblowers simply choose the most appropriate reporting path. Evidence indicating that this strategy is insufficient is the very small numbers of whistleblowers who use accountability agencies, and the difficulties they then have in making disclosures that accountability agencies take up.

'Distributed integrity', the reliance of accountability agencies on integrity structures within departments to investigate and resolve integrity breaches, is based on an important accountability principle: departmental staff need to take primary responsibility for the promotion of ethical and accountable cultures in their own workplaces. The practice of distributed integrity also depends on trust. Accountability agencies trust that departments will respond ethically, and that most integrity breaches can be dealt with cooperatively with only informal oversight. This strategy highlights the relational nature of accountability and, in principle at least, serves to strengthen institutional integrity and accountability within departments (Mulgan 2003, Brown and Head 2005, NISA Final Report 2005). In addition, the more intrusive, and resource intensive, coercive investigative powers of accountability agencies are reserved for when departments prove themselves untrustworthy and regulatory intervention is required to achieve resolution of wrongdoing. John Braithwaite (1998) conceives of this as 'institutionalizing distrust and enculturating trust'. This thesis uses his work to support its argument that accountability agencies are themselves breaching the trust placed in them by whistleblowers through over reliance on distributed integrity.

Resource constraints and problems with the legislation itself, particularly the 'public interest' threshold test, clearly contribute to agencies' limited achievements. In large part, however, accountability agencies have failed to develop approaches to whistleblowing that take into account the needs and vulnerabilities of whistleblowers. Accountability agencies, by and large, deal with whistleblowers' disclosures in the same way as they do for other areas of their work, for example, complaints from the general public. Complaints and disclosures are rarely dealt with except by referring them back to departments. More often than not, this fails to take into account the prior experiences of whistleblowers who have already made their disclosure within the department. In an additional breach of trust, allegations of reprisals against whistleblowers are also referred back to departments.

It may well be appropriate for departments to be given an opportunity to deal with their own integrity breaches. The resolution of such problems provides an opportunity for departments to strengthen their own compliance systems and attend to gaps in organisational culture. The role of accountability agencies is to ensure such action is taken. The analysis in this thesis indicates that frequently the involvement of accountability agencies ends at this point, with little in the way of ongoing independent oversight or intervention. Rarely is further action taken to ensure whistleblowers' disclosures are responded to properly and that whistleblowers are protected and supported.

As a result, accountability agencies tend to confirm whistleblowers' disappointment in the standards of ethics and accountability within the public sector and undermine the value of the moral agency whistleblowers demonstrate when they choose to speak out. The fundamental argument in this thesis is that, overall, accountability agencies in Queensland, New South Wales and Western Australia are failing to achieve the aims of whistleblower protection legislation and are not using the opportunities provided by whistleblowing cases to promote high standards of public administration.

The structure of the thesis is as follows.

Chapter 2 sets out the theoretical context and methodological approach adopted. It begins at the broadest theoretical point by establishing the core concepts of accountability applicable to the Australian public sector, drawing on the work of

Richard Mulgan and John Uhr in particular (see in particular, Mulgan and Uhr 2000, Uhr 2000, Mulgan 2003 and 2000). The purpose of accountability is examined, understanding the concept not only as a means of control, but also as a structure promoting ethical workplaces. The role of whistleblowers is conceived of in terms of 'moral agency', individuals who take personal responsibility for ensuring high standards of ethics and accountability in their workplaces, despite the consequences that sometimes follow. The often complex experience of speaking out about wrongdoing brings to the foreground questions of loyalty and trust. Relevant literature on these concepts is reviewed in order to explain the choices whistleblowers make about to whom they disclose wrongdoing and their expectations of the recipients. Literature on external accountability agencies, as a component of an 'integrity system', is reviewed to develop an understanding of their role and responsibilities. The concept of 'distributed integrity' is explored as the means by which accountability agencies support the promotion and maintenance of ethical standards in public sector departments, principally by trusting departments to respond with integrity to accountability agency enquiries. Finally, the Chapter outlines the methodological approach to data collection and the mixed quantitative-qualitative approach to its analysis.

The historical context and political influences on the terms of the parliamentary debate and the final form of the legislation are examined. Chapter 3 examines the whistleblower protection legislation developed in the three jurisdictions under consideration. As will be shown, the development of whistleblower protection schemes arise from each Government's commitment to improving standards of public sector administration following scandals and revelations of corruption. Whistleblower protection is not viewed as an end in itself, but a mechanism for strengthening accountability. While the core aims of the legislation are consistent, structural differences, for example, in decisions about who will be protected and in what circumstances, are seen to arise from the particular political context in each State.

Chapter 4 analyses the way in which accountability agencies have approached their roles and responsibilities under whistleblower protection legislation. Their roles in institutionalising the intent of the legislation are pivotal to its success. Data for this analysis is taken primarily from agencies' public annual reports and their websites.

Annual reports are in themselves an important accountability mechanism, providing information to parliaments and the public about each agency's financial and operational performance. These reports are used in this thesis as a main source of information on how agencies implemented their roles and the work undertaken to achieve legislative aims. Accountability agency websites are used to analyse the information they provide about their specific roles and responsibilities in relation to whistleblowing, and the specific advice offered to potential whistleblowers. The analysis of annual reports and websites reveals a range of approaches and much variation in the quality of public information. The best information in annual reports provides a clear picture of the agency's role and achievements, while others provide only raw numbers of whistleblowing matters they dealt with. The most usefully websites provide accessible and useful information to assist a whistleblower in making his or her disclosure. Some, on the other hand, provide no information at all about their role and no information to guide a whistleblower.

Chapters 5, 6 and 7 analyse empirical data on whistleblowing, collected by the 'Whistling While They Work' Linkage Project (WWTW) focusing on the roles of accountability agencies. The chapters are structured using a framework offered by the three core purposes of whistleblowing legislation: (i) to facilitate the making of disclosures, (ii) to ensure disclosures are properly dealt with, and (iii) to ensure the protection of whistleblowers.

Chapter 5 focuses on understanding why whistleblowers choose to report and how they go about doing so. Both quantitative and qualitative data indicate that personal decisions about integrity and morality underpin decisions to report wrongdoing. For the most part, whistleblowers report wrongdoing to someone within the department in order to have it stopped. In doing so, they trust that the department is committed to responding ethically to their disclosures and that they are loyal members of a 'moral community' with shared values and standards. It will be shown that the very small numbers of whistleblowers who report to accountability agencies do so only when their trust in, and loyalty to, their own department is breached. It becomes evident that, rather than facilitating disclosures, accountability agencies create barriers to whistleblowers reporting externally.

Chapter 6 provides a detailed analysis of the response by accountability agencies to disclosures made to them. It uses quantitative data to establish the high expectations of whistleblowers who make disclosures to accountability agencies, compared with their low levels of satisfaction. In this context, three sets of problems are examined qualitatively: issues that are internal to accountability agencies; difficulties in the relationships between accountability agencies and departments; and problems arising from lack of coordination between accountability agencies. The practical limitations of the concept of 'distributed integrity' become evident in the chapter and are understood as contributing to the low levels of satisfaction. The views of departmental staff are used to develop an additional perspective on the investigative practices of accountability agencies.

Chapter 7 draws on empirical data and the theoretical understanding developed in Chapters 5 and 6 to analyse the outcomes achieved by accountability agencies in their response to whistleblowers' disclosures. The analysis focuses on two different types of outcomes: first for whistleblowers themselves and, second, achievements in promoting high standards of ethical conduct in departments. The outcomes for whistleblowers are conceived of in terms of their support and protection. The analysis reveals that little in the way of proactive support, including risk assessment, is provided by accountability agencies. Further, accountability agencies' efforts to investigate and resolve reprisals against whistleblowers are shown to be very limited, breaching once again the trust whistleblowers have shown in a government agency. There are no direct measures of the second outcome, the extent to which accountability agencies have a positive impact on accountable and ethical departmental cultures. Some observations are, however, made about the failure of accountability agencies to take up opportunities offered by the experience of whistleblowers to identify and take steps to resolve integrity breaches associated with departments' responses to whistleblowing.

Chapter 8 addresses the themes and issues outlined in Chapters 2, 3 and 4 in light of the analysis of empirical data. Particular attention is brought to bear on the roles of whistleblowers and accountability agencies in an integrity system. The importance of trust as an element of the whistleblowing experience is also emphasised. It is evident both in the choices whistleblowers make about to whom they report and their

expectations of positive outcomes and in the practice of 'distributed integrity'. The limitations of this strategy become obvious when accountability agencies fail to utilise their capacity for independent assessment or investigation to ensure departments can be trusted to properly implement whistleblower protection schemes. The chapter concludes the thesis by drawing together its findings and making recommendations that might address some of the gaps that have been revealed in accountability agencies' implementation of whistleblower protection legislation.

# Chapter 2 Theoretical approach and methodology

> A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used. (Oliver Wendell Holmes Jr.)

## Introduction

The central hypothesis of this thesis is that external accountability agencies are not achieving the objectives of whistleblower legislation in New South Wales, Queensland or Western Australia. In all three States whistleblower legislation is aimed primarily at (i) protecting those who disclose information about wrongdoing in government departments, (ii) facilitating disclosures made in the public interest and (iii) the proper investigation of those disclosures. Whistleblower legislation is intended to strengthen existing accountability frameworks and in theory, and to an extent in practice, it does. This thesis argues, however, that the reliance of accountability agencies on the concept of 'distributed integrity' and their failure to develop and use additional procedures for dealing with whistleblowers and their disclosures has severely limited the effectiveness of their role in institutionalising the legislative objectives.

There is a vast literature on the contested topic of accountability and a smaller but nonetheless significant body of work focused on the role of accountability agencies. Not all of this literature is covered here. A narrower focus is brought to the core concepts of accountability and attendant regulatory frameworks relevant to the Australian public sector (see in particular Mulgan 2000 and 2003, Mulgan and Uhr 2000 and Uhr 2000) and the role of whistleblowers in such frameworks.

The core concepts of accountability are stretched, but hopefully not distorted, by encompassing Melvyn Dubnick and Jonathan Justice's work that highlights accountability not only as a means of control, but having as its purpose and promise, the development or enhancement of a sense of responsibility in autonomous individuals who recognise their 'moral obligation to account for their actions' (Dubnick 2007).

Dubnick is of course not alone in focusing on the need for more than simple compliance with accountability requirements. John Uhr, for example, argues that ethical responsibility and public accountability should converge through a commitment to the 'ethics of accountability' (Uhr 2000).

This conception of accountability is particularly relevant not only to understanding the role of whistleblowers as individuals playing their role in bringing wrongdoers to account, but also the role of external accountability agencies whose roles encompass strengthening integrity systems in public administration (see for example, Grabosky 1989, NISA Final Report 2005, Head, Brown and Connors 2008). The analysis of the role of accountability agencies within an integrity system provides, in turn, the basis for exploring the concept of 'distributed integrity' (Braithwaite J 1998, and Head, Brown and Connors 2008 provide particularly important insights).

Central to this concept is that integrity necessarily resides within government departments themselves, not just with core agencies in an integrity system. The institutionalisation of ethics and integrity within departments is fundamentally the responsibility of senior management who need to set standards for ethical behaviour and establish integrity-related strategies and networks within their department (Brown *et al* 2005:13 and 83). Accountability agencies can employ two main strategies to support departments in the promotion and maintenance of ethical standards: coercive investigation with recommendations for procedural change, and more proactive strategies aimed at improving systems and changing cultures (Smith 2008:116).

The experience of the majority of Australian public sector whistleblowers confirms the existence of ethical and accountable workplaces. This is in direct contrast to the much smaller number which makes disclosures to accountability agencies at some stage in their whistleblowing experience. They generally do so as a result of believing their trust in, and loyalty to, their department have been breached by the department's inadequate response to their internal disclosures, and the experience of reprisals for having made the disclosure. In making an approach to an external accountability agency, most whistleblowers are hoping to achieve some resolution of these problems. They are, in effect, trusting that accountability agencies, with their substantial investigative and

reporting powers, will fill the integrity gap they perceive has been created by their own departments.

The academic literature on trust is therefore also important in the theoretical framework within which empirical data are analysed. Once again, the focus is narrow. Literature on understanding trust in terms of organisations and its role in governance is particularly relevant to understanding whistleblowers' choices of reporting paths. Trust is also a key component of both the theory and practice of 'distributed integrity' (of particular importance are Hardin, Levy and Braithwaite J in Braithwaite and Levy 1998 and Kramer 2006).

Last, but of course not least, is the growing literature on whistleblowing. Academic analysis of whistleblowers and whistleblowing includes debates on the proper definition of whistleblowers and the action of whistleblowing, questions of loyalty or organisational dissidence, the consequences for whistleblowers and the role they play in improving accountability (see, for example, Dworkin and Callahan 1991, Near and Miceli 1995, Miethe 1999, Smith 2010). These debates are all of relevance to this thesis and the possibility of determining whether accountability agencies are in fact achieving the aims of the whistleblower legislation in the jurisdictions under consideration.

The chapter is broken into five sections. The first section considers the core concepts of accountability, particularly as they relate to whistleblowing. The second section develops the core concepts by taking into account the purpose of accountability. Section three focuses on understanding trust and organisational loyalty and the significance of these concepts to understanding the role and experience of whistleblowers. Building on this foundation, the fourth section deals with the roles of accountability agencies in integrity systems and the notion of 'distributed integrity'. The last section, the fifth, focuses on defining whistleblowing, its contribution to accountability and the consequences for whistleblowers of reporting to accountability agencies.

It may seem odd to consider whistleblowers last when they are central to this thesis. My point in doing so is to situate whistleblowing within the broader concept of accountability. Their individual experiences are very important to the understanding of

their role in integrity systems which is developed in this thesis, but it is essential to consider those experiences in the context of trust, loyalty, ethics and moral agency.

## An accountability framework

Accountability is a key concept in the study of modern liberal democracy and public administration. It is, as Richard Mulgan states '*a buzzword of our era'* (Mulgan 2003) and yet its definition is unclear and frequently contested because it is a term used in many contexts and for a range of different purposes.

This section begins by considering Mulgan's delineation of the core sense of accountability. The analysis that follows defines the scope of accountability relevant to this thesis, and it is structured around four key questions: who is accountable, to whom, for what and how? In this analysis of core concepts and processes, the particular roles of accountability agencies and whistleblowers within Australian accountability frameworks provide the focus. A sufficient analysis of these roles requires consideration of what might constitute the 'public interest' since this concept is a component of all the relevant whistleblower protection legislation. Contemplation of the 'public interest' is therefore also included in this section.

### The core concept of accountability

There is general agreement that, in its simplest and strictest sense, accountability is the requirement or duty to give an account for one's actions to someone with the authority to require this (Jones 1992 cited by Mulgan 2000:555, Scott 2000:40, Aldons 2001). However, there is much debate about the extent to which the term has come to stand for other related concepts including responsibility (Uhr 1993, Bovens 1998, Considine 2002), transparency (Bentham and Heald cited in Hood 2010), control (Elcock 1998, Scott 2000, Mulgan and Uhr 2000), answerability, liability and even blameworthiness (Dubnick and Justice 2006). As Richard Mulgan has noted, it is also commonly used to describe political responsiveness to public concern (Mulgan 2002a).

In order to save the concept of accountability from expanding to mean everything and therefore losing sensible proportion, becoming the '*general term for any mechanism that makes powerful institutions responsive to their particular publics,*' Mulgan carefully delineates the core sense of accountability to mean external scrutiny and the

possibility of sanctions. He describes its core processes as initial reporting and investigating (obtaining information), justification and critical debate (discussion of the information provided) and the imposition of sanctions where information is insufficient or wrong (rectification) (Mulgan 2003:29-30, but see also Bovens 2010:960).

Mulgan's core concept of accountability rests on four questions: (1) who is accountable, (2) to whom, (3) for what and (4) how? (Mulgan 2003:22-30). These questions are of essential relevance to whistleblowers who need to choose who to report to in the hope of achieving a positive response to their disclosures.

## Who is accountable and to whom?

The first two questions, 'who' and 'to whom', imply a relationship where an individual or an organisation are able and duty bound to give account of their actions to another individual or organisation who has authority to require and scrutinise that account. These requirements vary according to the context-specific institutional relationships that are in place (Mulgan 2002a:3, Dubnick and Justice 2004:20-21). Within the arena of public administration there are a range of such requirements including hierarchical relationships: Parliaments to the electorate; ministers to the Parliament; departmental heads to ministers; departmental officers to departmental heads.

In these relationships those who are accountable include individuals whose personal conduct can be called to account through a chain of command within an organisation, those who hold 'role accountability' on behalf of an organisation by virtue of their being in positions of authority, and 'collective accountability' which refers to the obligations of, for example, a department to account for its provision of efficient and effective services to the public (Mulgan 2003:22-24). As will be shown in later chapters, many whistleblowers consider disclosing wrongdoing to be their duty as accountable individuals, and in so doing, appear to reflect one aim of whistleblower legislation – encouraging disclosures of wrongdoing that are made in the public interest (another contested concept that will be explored below).

The hierarchy outlined above rests on the ultimate moral authority belonging to the public, those 'to whom' accountability is owed.

In acknowledgement of the complexity of modern public administration, the function of calling public sector departments and officials to account is delegated to a number of specialised agencies. Within this hierarchy, therefore, there are also significant authorities or regulators whose role is to keep the bureaucracy under control (Hood et al 1999:13) as well as promoting public accountability and good governance (Uhr 2000:17). These include courts, tribunals and other enforcement agencies with very broad remit, as well as specialist review and audit agencies which act on behalf of the public by holding other public sector departments to account (Mulgan 2003:25). The independence of these agencies is institutionalised through their accountability to the legislature rather than the government of the day, although the extent of their activities is dependent on the resources allocated by the government. They nonetheless have the essential component of 'externality' that is essential to the definition of 'to whom' accountability is due.

Four 'families' of these oversight agencies are of particular interest in this thesis: auditors-general, ombudsmen, corruption commissions and public service commissions. This particular interest arises because whistleblower legislation in the jurisdictions within the scope of this thesis generally limits the special protection for whistleblowers who report outside their departmental structures to those who approach these agencies. At the time of the data collection which informs this thesis, only in New South Wales were disclosures to members of parliament and the media protected, and then only in very constrained circumstances.

As will be discussed in more detail in Chapter 3, parliamentary debate on the proper structure of whistleblower legislation in each State acknowledged the significance of these specialised oversight agencies in the accountability structure of public administration through the uncontested inclusion of them as appropriate recipients of disclosures by whistleblowers (although criticisms were levelled at specific agencies). The references made particularly by government members of each Parliament to the authority, expertise, experience in investigation of these agencies (see for example, West 27/11/92:10482 and Goss 19/10/94:9691) align with at least the two of Mulgan's core processes of accountability: obtaining information and debating or justifying that information.

Accountability agencies do not have the power of direct rectification, the imposition of remedies and sanctions. Their main functions are '*the search for evidence and the publication of reports and recommendations, that is through the prior states of information and discussion*'. (Mulgan 2003:95-98). Their capacity for rectification relies on the response by others, primarily ministers and departmental heads, to their recommendations for rectifying wrongdoing and improving standards of public administration or corruption prevention.

Whistleblower legislation in Queensland, New South Wales and Western Australia does not give pre-eminence or preference to these external avenues of disclosure over the accountability systems within government agencies. The essential role of government departments themselves in developing and maintaining ethical and open cultures was directly acknowledged during parliamentary debate (see, for example, West 27/11/92: 10482). Departments themselves constitute a mechanism that, unlike external oversight agencies, can fulfil all three core processes of accountability: they can receive and investigate disclosures from whistleblowers (information), consider (discuss) the findings, develop and require remedies where actions or systems have gone awry or impose sanctions where individuals are found to be at fault (rectification). It is this capacity for the development of accountable and ethical systems and cultures within departments that are central to the principle of 'distributed integrity' examined below.

## For what?

The third of Mulgan's questions is 'accountable for what?' Broadly speaking, the answer refers to '*the performance of some task or duty which the agent is required to perform and for which he or she is responsible'* (Mulgan 2003:28; see also Aldons 2001). Within a context of public administration, this can include fiscal accountability, efficient and effective performance (Elcock 1998) as well as compliance with codes of ethics and of conduct and a range of government laws and regulations governing the way public administration should be conducted (Uhr 2000:9, Mulgan 2003:29). Public service departments are potentially accountable for all aspects of their performance, including decisions, outcomes and processes (Mulgan 2002a:5).

The 'what' that can be the subject of a disclosure which complies with the whistleblower protection legislation in each State is specified in the Act.

Whistleblowers and their disclosures to these agencies are protected when it is deemed that the disclosure meets two minimum criteria. The first of these is that the agency to which the disclosure is made is a proper authority to respond, i.e. that it concerns matters within the existing jurisdiction of the agency. This enables whistleblowers to make disclosures within their department or to an oversight agency which has the relevant jurisdiction.

Oversight agencies have jurisdiction over specific types of conduct: ombudsmen's offices over maladministration, corruption or criminal commissions for criminal or corrupt behaviour, and auditors-general for financial accounts and more recently for effective and efficient performance. Public service employment agencies vary in their remit but broadly speaking are responsible, and therefore accountable, for setting and monitoring standards and codes of ethics and conduct for the public sector as well as strategic planning and management of the public sector workforce. These agencies are accountable for receiving and investigating disclosures by whistleblowers pertaining to their existing jurisdiction. An exception to this is New South Wales where the ombudsman was given additional powers to investigate reprisals against whistleblowers.

The second criterion is a threshold test - that the subject of the disclosure is 'in the public interest'. This is a legislated threshold designed to ensure that existing avenues for reporting matters such as personnel grievances are not subverted and that not all complaints or disclosures are given the special protection offered to whistleblowers. The concept of 'public interest' requires attention in this discussion of what accountability agencies are accountable for because it is an essential criteria in the determination of what counts as a protected disclosure and who therefore warrants whistleblower protection.

### *The public interest*

The 'public interest' is a phrase used often and in many contexts. It is perhaps surprising then that it is another contested concept that is difficult to define. The term itself can be seen as misleading or at least confusing. '*What's in the public interest and what the public are interested in are two different things'* as the then Immigration Minster, Amanda Vanstone, said to a reporter ('The 7.30 Report' 07/02/2005). More

relevantly, Deborah Stone writes that '*there is virtually never full agreement on the public interest, yet we need to make it a defining characteristic of the polis because so much of politics is people fighting over what the public interest is and trying to realize their own definitions of it'* (Stone 1998:2). By way of contrast, the Australian Senate Committee on Constitutional and Legal Affairs found the concept undefinable:

> *…'public interest' is a phrase that does not need to be, indeed could not usefully, be defined… Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another… the relevant public interest factors may vary from case to case – or in the oft quoted dictum of Lord Hailsham of Marylebone 'the categories of the public interest are not closed'.* (1979 report on the draft Commonwealth Freedom of Information Bill, cited by Wheeler 2006:14)

Wheeler also cites the High Court of Australia (O'Sullivan v Farrer (1989) 168 CLR 201, per Mason CJ, Brennan, Dawson and Gaudron JJ (1t 217)) in support of the argument that the 'public interest' is not one homogenous concept and that it requires consideration within the specific context in which it arises:

> *The expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable'.* (Wheeler 2006:14)

An example of the potential conflict of varying 'public interests' is in fact epitomised by the protection of whistleblowers. Sir Gordon Borrie refers to the 'public interest' served by the general duty of any employee not to disclose confidential, professional or trade information gained in the course of their employment but notes that this obligation might be overridden by a greater 'public interest' in the disclosure of information about illegal or dangerous practices. Borrie concludes that a test of whether the disclosure of information is in the 'public interest' depends on to whom the disclosure is made. His rule of thumb is that disclosures which cause the least damage are those which are appropriate and so disclosures outside the organisation to oversight or regulatory bodies tend to be in the public interest. He goes on to say that if the regulator is in a position to safeguard the public interest as a result of the disclosure, then a public disclosure to the media would probably not serve the public interest (Borrie 1996:11-12).

Whistleblower statutes in all three States refer to the 'public interest' as a threshold test for what disclosures would be protected under the Act. In New South Wales and Queensland the 'objects' sections of the legislation refer to disclosures in or promoting the 'public interest'. In both Queensland and Western Australia the legislation also refers directly to 'public interest' disclosures. Uhr refers to these 'public interest disclosures' as:

> *...breaches of conventional norms of organisational accountability, which bring to the notice of an outside authority, such as an auditor-general, information about activities allegedly at odds with the public interest.* (Uhr 1999:100)

There is, however, little in the legislation to guide whistleblowers, or in fact recipients of disclosures, as to what might constitute this 'public interest'. The subject matter of protected disclosures is broadly speaking maladministration, waste and mismanagement and corruption. These activities necessarily have an important public interest dimension as they involve the use or misuse of public means (Bovens 1998:170) but there is in the legislation an undefined threshold test. The Queensland Act refers to disclosure of information that is 'substantial and specific' (s.8 (2) and (4)) while the Western Australian Act provides grounds for the recipient of a disclosure to refuse to investigate if the disclosed information is trivial (s.8(2)(a)).

This lack of definition is consistent with Keating's observation that:

> *...typically there is no such statutory guidance for departmental officials. Instead one of the strengths of a democracy is that unelected officials do not have an unspecified power to determine what is in the best interests of the public. Most importantly it is not clear what exactly would legitimise a senior bureaucrat's perception of the common good against that of the democratically elected government which is then held accountable for its decisions.* (Keating 1999:46)

Whether it is legitimate or not, whistleblower protection legislation requires some determination by staff of departments and accountability agencies of whether a disclosure is of 'public interest'.

Applying a 'public interest' test to disclosures presents a practical difficulty in that those staff and whistleblowers may in fact have very different ideas about how important or significant a matter should be for it to be considered of 'public interest'. Chris Wheeler, Deputy NSW Ombudsman, presents as a remedy that the 'public

interest' should be viewed as the approach to or objective of decision-making rather than '*a specific and immutable outcome*':

> *The meaning of the term, or the approach indicated by the use of term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matter of broader (i.e. more 'public') concern.* (Wheeler 2006:24)

Even this remedy clearly leaves room for disagreement between whistleblowers and recipients of their disclosures as to whether the information disclosed passes the threshold test. Rather hopefully perhaps, Wheeler advises that:

> *...if the basis for a decision is properly documented this supports the credibility of the decision-maker and the decision-making process in the eyes of [the] third party, even if there is disagreement with the merits of the decision made.* (Wheeler 2006:23)

Suffice to say at this point, that the openness of the definition of the 'public interest' can leave the 'what' of disclosures protected under whistleblower legislation in a contestable position and whistleblowers in a difficult position.

## And how?

Compared to contested issues such as the 'public interest' in an account being rendered, describing the mechanisms by which that account is given is relatively simple. There are a wide range of processes and procedures which constitute the mechanisms of collective and role accountability in public administration including financial and audit reports, annual reports that include financial and performative information, questions in Parliament, inquiries and public hearings, formal investigations and subsequent reports, private discussions and political debates (Mulgan 2003:29).

Departments and departmental staff render account to oversight agencies by responding to telephone or written inquiries, providing answers to questions and requirements to produce documents. The requests and the responses can be 'informal' in that no statutory powers are invoked but, as is discussed below in more detail, accountability agencies rely on departments to provide accurate and honest responses and full disclosure of relevant documents. If no such response is forthcoming, it is open to many oversight agencies to invoke formal investigative or inquiry powers whereby

departmental officers can also be required to give evidence under oath or produce documents or statements of information (e.g. NSW Ombudsman Act ss.16, 18 and 19).

Mulgan notes that an internal chain of command usually provides the structure for individual or personal accountability, with each individual being accountable to his or her supervisor. He also states that on occasion:

> *Individuals may exercise their personal accountability against the chain of command, as when their professional conscience leads them to answer directly to the public by leaking confidential information or by whistleblowing.* (Mulgan 2003:30)

The form of whistleblowers disclosures either within departmental structures or to external accountability agencies are to some extent prescribed in the relevant Acts. In the three States in this thesis, these disclosures can be made orally or in writing. Only the Queensland Act makes explicit reference to the protection of anonymous disclosures. The Acts in New South Wales and Western Australia are silent on the issue. However, anonymous disclosures are protected in each State, provided that it is made to an appropriate authority and it is clear that it is a disclosure under the relevant Act (Public Sector Commission WA and NSW Ombudsman 2004 websites).

The core structures and processes analysed above, particularly in relation to whistleblowers and their role, provide the framework of accountability. What is not yet explicit is the overall purpose of the extensive accountability processes that are employed in modern public administration. The next section reviews a range of academic writing on this topic.

## The purpose of accountability

Accountability with its rules and processes is of course not an end in itself. Yet the purpose of this core concept remains the subject of some debate. This section analyses a range of writing on this topic, beginning with compliance based objectives related to 'control' before engaging with Dubnick's contention that the development of individual personal responsibility and 'moral community' are the most important objectives of accountability. The necessity of moving beyond conceiving the purpose of accountability as a control and rectification process becomes clear from analysis of the purpose of whistleblower protection legislation.

Colin Scott writes that '*the ill-defined objectives lying behind the accountability concerns include the holding of public actors to the democratic will (through a concept of legality) and promoting fairness and rationality in administrative decision-making*' (Scott 2000:39). Bovens takes this still fairly loosely defined purpose a step further by referring to '*democratic control, the rule of law and efficient management are still the ultimate goals*'.

Mulgan and Uhr are even more specific, stating that '*if informing and explaining are the core processes of accountability, the core purpose is control… Reporting and explaining are of little value unless they lead ultimately to redress or improved performance* (Mulgan and Uhr 2000:1). The theme of ensuring the high standards of performance is made explicit in a report from Australia's National Audit Office in 1989:

> *Accountability is the fundamental prerequisite for preventing the abuse of delegated power, and for ensuring, instead, that power is directed to the achievements of broadly accepted national goals with the greatest possible degree of efficiency, effectiveness, probity and prudence.* (cited by Trimmer 2004)

Justice Spigelman also focuses on the control of the exercise of delegated power in describing the role of oversight agencies:

> *The role of oversight agencies as part of the integrity branch or function of government is 'to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.* (Spigelman 2004)

A cautionary note is sounded on this point: that accountability is not an '*unqualified good and can sometimes come at too high a cost'* (Mulgan 2002b:22) and '*more accountability cannot invariably be presumed to cause better results*' (Dubnick and Justice 2004:22). Mulgan, in particular, notes that accountability is intrusive, time-consuming and expensive, diverting resources from the core purposes of government departments, and in terms of accountability agencies requiring the establishment of expensive and intrusive institutions (Mulgan 2002b:4-5 and 2003:236-9).

Melvyn Dubnick and Jonathan Justice note the need for institutional accountability mechanisms aimed at answerability or control and the assurance of both '*ethical behaviour and effective performance by public officials*' (Dubnick 2007, Dubnick and

Justice 2004). However, they emphasise the narrowness of any definition of accountability reliant only on reporting or compliance schemes and reject the central purpose of accountability as being a means of external control:

> *...functional definitions of accountability tend to highlight the institutional features of the arenas within which accountability operates ... procedural and performative manifestations (e.g. reporting, auditing, excuse-making, oversight) rather than the more substantial phenomena it represents within the governance framework.* (Dubnick and Justice 2004:4)

They are of course not alone in focusing on the need for more than simple compliance with accountability requirements. Mulgan also writes that accountability is much more than '*the enforcement processes of detection and punishment*,' that these processes are best employed as the underpinning of voluntary compliance, cooperation and a shared commitment to key values (Mulgan 2003:236-9). The convergence of ethical responsibility and public accountability becomes a commitment to the '*ethics of accountability'* (Uhr 2000). This commitment requires a balance between external public accountability and internal personal responsibility (Uhr 2005).

In a similar vein, Dubnick contends that the central purpose of accountability is to foster 'a sense of responsibility and obligation among … autonomous agents … truly accountable individuals [who] have a moral obligation to account for their actions' (Dubnick 2007:28). He emphasises accountability as being a relationship, at least between the reporter and the person reported to, but also more broadly between the reporter and his or her 'moral community'. A 'moral community' is one in which the individual's ethics and values are shared and understood by the community and where social relationships are built on a similar sense of what is morally required or appropriate. In this context of 'moral community', accountability emerges as '*a primary characteristic of governance in contexts where there is a sense of agreement and certainty about the legitimacy of expectations among community members ...a form of governance that depends on the dynamic social interactions and mechanisms created within such a moral community*' (Dubnick and Justice 2004:12).

This conception of accountability is particularly relevant not only to understanding the role of individual whistleblowers in an accountability framework, but also of the role of oversight or regulatory agencies. The contexts envisaged by Dubnick are necessarily as

broad as the electorate in a democratic system but also as narrow as a single public service department or even a work unit. The need for legislated structures to provide whistleblower protection and ensure a proper response to their disclosures is indicative of gaps or uncertainties within these communities about agreed standards of conduct and values.

Providing whistleblowers with a range of reporting avenues is intended to ensure the best opportunity for whistleblowers to be heard and protected. Whistleblowers believe they are behaving loyally when they report internally. However, if their immediate community or department is unresponsive and/or punitive, indicating that the whistleblower is not acting within the cultural framework of his or her workplace, whistleblowers can consider giving up loyalty and decide to report externally (Bovens 1998:174), including to external oversight agencies.

The analysis of empirical data in this thesis confirms Bovens' hypothesis: the whistleblowers who do take this step do so only when they believe their trust in, and loyalty to, the department has been breached and in the hope of finding in this broader community respect for the moral stance they are taking, protection from reprisals and an appropriate response to the content of their disclosures.

## Trust and loyalty

Academic writing on trust is another huge body of work and its full review is not contemplated in this thesis. It can be conceived as widely as public trust in government and its institutions or as a component of personal relationships and an element of every social interaction in between. Once again the focus of this review is providing a theoretical framework in which the experiences of Australian public sector whistleblowers can be framed.

'Trust' is one of the theoretical codes that became evident from the grounded theory approach to the analysis of whistleblower interviews that was undertaken for this thesis. The importance for whistleblowers is two-fold: knowing who they can trust to report to, and the consequences of the breach of that trust. This section therefore begins by defining this concept of trust.

The whistleblowers in this study believed that they were acting ethically in making disclosures and loyally by making them within departmental structures. It is therefore also important to explore what these notions of ethical behaviour and loyalty might mean in an organisational context. Inevitably, questions about ethics and ethical behaviour arise, not just in terms of the actions of whistleblowers but also more broadly in relation to accountability and public trust in public administration. Ethical and moral behaviour is differentiated (Uhr 2000 and 2005) in order to explore further the possibility for developing 'moral community' within departments. The issue of loyalty is approached by way of conceiving loyalty as being to a department's public interest purpose and its codified ethical and/or moral standards (Bovens 1998, Vanderkerckhove and Commers 2004) and its breach being evidence of 'value incongruence' (Sitkin and Roth 1993). The section finishes by proposing that the capacity of oversight agencies to resolve problems arising from whistleblowers being treated as disloyal is limited since the responsibility for developing and maintaining core values and ethical standards lies primarily with departments themselves.

## Conceptualising 'trust'

'*Not just in a fuzzy, abstract sense but a myriad of formal ways, trust makes our world go around'* (Brown and Uhr 2004). While such statements emphasise the importance of trust, they do not provide a theorised understanding and it is important for this thesis to begin at that point.

Trust has been analysed as a three part relationship. This includes the 'truster', the 'trustee' and the specific context or domain in which trust is conferred (Levi 1998, Hardin 2006). The significance of context or domain is that the trustee may be trusted to do some things but not others. Hardin and Levi both analyse trust as a form of encapsulated interest: A trusts B on the presumption that it is in B's interest to act in a way consistent with A's interest (Levi 1998, Hardin 1998).

What is evident is that trust implies risk: the trustee may not in fact respond in the way the truster hopes for (Mayer et al 1995, Kramer 2006, Hardin 2006). Trust can therefore be distinguished from confidence in that while both may lead to disappointment, trust requires consideration of the implications of a choice of action and a willingness to be

vulnerable, whereas confidence assumes a lack of vulnerability or risk (Luhmann cited by Mayer et al 1995:213, Levi 1998, Mayer et al 2006).

Braithwaite on the other hand distinguishes between trust as 'obligation' and trust as 'confidence'. Trust as obligation is based on legal and moral obligations on the trustee to honour the trust placed in them. In its 'thin version' trust as confidence is primarily the expectation that the trustee will do what is wanted, while in its thicker versions there is an attribution of goodwill, solidarity and shared group identity. Braithwaite shows that there is a reciprocal relationship between trust as confidence and trust as obligation and that the one increases the other (Braithwaite 1998: 344-347).

The question of trustworthiness is obviously also important. The 'trustee' is expected to respond positively, that is competently, dutifully, ethically. Braithwaite observes that trustworthiness can be simply a statistical probability that trust will be honoured (Braithwaite 1998:344). However, Mayer *et al* summarise previous research on the factors of trustworthiness and conclude that three characteristics appear most often: ability, benevolence and integrity. Ability includes skills, competencies and influence within a particular domain; benevolence is '*the extent to which a trustee is believed to want to do good to the trustor*', implying some specific attachment; and integrity involves the trustor believing the trustee '*adheres to a set of principles that the trustor finds acceptable*' (Mayer *et al* 2006:90-93).

The relationship of truster and trustee conceptualised as adherence to shared principles is evocative of Dubnick and Justice's 'moral community' and its relevance to whistleblowers, and therefore brings us naturally back to the issue of organisational trust.

Knowledge of the existence of at least the last two of these characteristics, benevolence and integrity, implies that the truster has some experience of at least the reputation of the trustee, if not in fact personal dealings. The capacity to trust is learned from such interactions with another and generalisations about future action (Kramer 2006, Hardin 2006). From here is it possible to extrapolate from interpersonal trust to institutional trustworthiness. Trust of an institution is based on an understanding of its role and purpose, its reliability and reputation and the experience of that institution realised through interactions with its employees (Braithwaite 1998, Hardin 1998, Levi 1998).

The next section of this review therefore contemplates the structures within the organisation that promote its reputation for being trustworthy and ethical.

## Trust and ethics in public administration

While there is an obvious intuitive link between trustworthiness and ethical conduct, it is important for this thesis to develop an explicit connection. The covering statement in an OECD policy brief on public trust provides a bridge:

> *Public service is a public trust. Citizens expect public servants to serve the public interest with fairness and to manage public resources properly on a daily basis…Public service ethics are a prerequisite to, and underpin, public trust, and are a keystone of good governance.* (OECD 2000)

The OECD goes on to advise that identifying 'core values' is an essential first step to creating '*a common understanding within society of the expected behaviour of public office holders*' (OECD 2000:2). Following the articulation of these core values, the OECD recommends legislated standards of behaviour to clarify the boundaries of conduct and the institutionalisation of transparency and integrity as essential core values (OECD 2000).

The principles that underpin the conduct of public officials as '*models of administrative responsibility*' (Uhr 2000:1) are increasingly frequently formalised in Australia as statements of core values and promulgated as codes of conduct and ethical behaviour (Uhr 2000, Jackson and Smith 1995, Sinclair 1993). They are supported in some jurisdictions by regulatory frameworks (Uhr 2000) that can be either aspirational or disciplinary (Preston 1995:463).

Braithwaite argues for regulatory frameworks that foreground or 'enculturate' trust in those who are being regulated or held to account while retaining increasingly interventionist remedies for breaches of that trust, starting with education and deterrence but with the ultimate possibility of 'incapacitation' (Braithwaite 1998). This 'regulatory pyramid' can be seen as combining the elements of aspiration and discipline, with the 'paradox' of the pyramid being that '*by signalling a willingness to escalate to draconian strategies of total distrust … one can increase the proportion of regulatory activity that is based on trust'* (Braithwaite 1998:352).

Braithwaite's work supports the contention that while undoubtedly valuable in defining the purposes and conduct of government and strengthening accountability frameworks, the risk in narrowing the focus of ethical behaviour to compliance with codes of conduct is that broader questions of personal ethical and moral behaviour are disregarded (Preston 1995, Uhr 2000 and 2005).

Jackson and Smith observe that codes of ethics only contribute to standards of conduct if high ethical standards are not already in place or there is no high degree of consensus about what these ethical standards might be (Jackson and Smith 1995:484). Compliance regimes set the minimum standard for ethical behaviour by standardising '*a shared professional conscience*' (Uhr 2005:196, but also Sinclair 1993, Preston 1995 and Jackson 1998), promoting reliability and symbolising a cultural unity based on shared values (Sitkin and Roth 1993). Legalistic remedies to breaches of ethical standards are not however sufficient for achieving consensus on the morals or values that underpin 'right' or compliant behaviour (Sitkin and Roth 1993, Preston 1995, Uhr 2005).

A number of commentators, including Uhr, Preston and Jackson, acknowledge the need for public servants to rely on a personal morality and sense of responsibility that underpins right or compliant behaviour but is also capable of dissension in the face of unjust, illegal or unethical demands: '*The ethical test of proper use of powers cannot be reduced solely to a legal one without exhausting ethics of any moral meaning'* (Uhr 2000:6). Weaver's work on 'virtue' in organisations also emphasises that the importance of ethical behaviour is not as an end in itself, but rather as a demonstration of the development of an employee's moral identity (Weaver 2006:341) and consequent capacity for moral agency – a virtuous circle wherein moral behaviour reinforces a self-concept of moral identity (Weaver 2006:358). Weaver contends that leadership and organisational structures that support moral identity embed virtuous action as part of the collective culture of the organisation (Weaver 2006:361). Moral identity embedded in shared values which support compliance as well as principled dissent are perhaps one foundation of the 'moral community' conceptualised by Dubnick and Justice (2004).

The duty of a public servant to the government, the department or his or her superiors is '*disengaged where the government contravenes the public interest'* (Jackson 1998:247) or is at least provisional in that '*... loyalty to the public interest and to the democratic*

*process are the ultimate obligations of functionaries*' (Bovens 1998:164). However, commentators such as Bovens and Uhr counsel against reliance on individual beliefs and personal ethics as too variable to form the only basis of ethical conduct, with Bovens recommending instead reliance on loyalty to one's peers and '*social values such as decency, collegiality and trustworthiness*' (Bovens 1998:160). Nonetheless, the ultimate decision about whether or not to carry out a questionable or dubious action rests with the individual based on individual conscience, personal integrity and reputation. The same is true of whistleblowers who may then be caught in a conflict of loyalty because of their implied or actual criticism of their colleagues or their superiors (Bovens 1998:192-3).

## Loyalty in organisations

Organisational loyalty is created by '*the corporate culture which complements moral principles, work rules and evaluation systems'* (Vanderckhove and Commers 2004), a concept not dissimilar from the integrity characteristic of trustworthiness identified by Mayer *et al* (2006). Sitkin and Roth situate distrust within organisations in '*generalised value incongruence*', a gap between an employee's beliefs and values and those of the organisation (Sitkin and Roth 1993:367). Distrust has obvious consequences for social relations, and therefore for loyalty, particularly when loyalty is defined as '*a question of mutual obligations'* (Solomon 1997 cited by Vanderckhove and Commers 2004) and not an abstract principle.

Disclosures by whistleblowers are evidence that they may not share the same values, let alone agree to mutual obligations they consider dubious and they can be viewed as both untrustworthy and disloyal by their colleagues and superiors. This is by no means always the case and the disclosure of information can be viewed as a valuable contribution to good government (Brown *et al* 2008, Smith 2010), but when it is not the consequences for whistleblowers are often serious. Alford's writing on organisational power and the broken lives of whistleblowers is dramatic but illustrative:

> *In creating the whistleblower, the organization is stating that there is a certain type of person it cannot stand in its midst, not necessarily one who goes outside the organization, but one who appears to remember that there is an outside.* (Alford 2001:20)

Whistleblower protection legislation is intended at one level to resolve this issue of disloyalty, providing a symbolic statement that disclosing misconduct in line with legal constraints does not constitute disloyalty to the organisation. To take it one step further, legislative whistleblower protection indicates that reprisal action or other mistreatment of whistleblowers is the disloyal action (as well as a disciplinary or criminal offence), breaching as it does the standards of conduct and ethical behaviour envisaged in the legislation and consequent procedures.

## Remedies for breaches of trust and loyalty

However, the practical effect of the legislation is limited not just by the structure of individual acts, but because legal mechanisms are not particularly effective in dealing with the kind of generalised value incongruence between whistleblowers and their colleagues and/or managers (Sitkin and Roth 1993:373). Whistleblowers believe they are behaving loyally when they report internally and the analysis of empirical data in this thesis indicates that whistleblowers approach external accountability agencies only when they believe this loyalty, and their trust, has been breached either by insufficient action being taken in response to their disclosure or their experience of reprisals or other bad treatment.

External accountability agencies are experienced in the investigation of allegations of wrongdoing but, particularly for those which have been given additional responsibility for the investigation of reprisals against whistleblowers, the terrain is new and complex. Some actions taken in reprisal for whistleblowing are quite formal and obvious, for example termination of employment or enforced transfers. Other actions, like increased supervision, ostracism or bullying, while no less harmful are not amenable to investigation because of the difficulty in obtaining evidence – fingerprints are rarely left. Even where reprisals can be investigated and stopped, it seems unlikely that external accountability agencies could have a practical impact on the restoration of trust and loyalty.

Extrapolating from Sitkin and Roth, an accountability agency's formal recommendations for restoration or improvement of ethical conduct within a department can result in compliance and can be effective in restoring reliability in processes, procedures and tasks. They are, however, only a '*functional substitute'* for the goodwill,

trust, core values and principles that constitute an ethical culture within an organisation (Sitkin and Roth 1993:376) and are shared by members of a 'moral community'. Once whistleblowers are in a position of being viewed as disloyal and/or untrustworthy, external intervention is unlikely to resolve their personal circumstances. Resolution of issues of trust and loyalty can only be achieved by the department itself. On this basis, it is hypothesised that the achievements of oversight agencies in response to disclosures by whistleblowers are stronger in providing accountability mechanisms directed at control and answerability than they are in improving integrity and moral community. It is for this reason that in this thesis they are referred to as 'accountability agencies' rather than 'integrity agencies' as has become the fashion with commentators in this area, particularly since the National Integrity System Assessment project conducted in Australia between 1999 and 2004.

Notwithstanding their limitations, external accountability agencies have a role to play in an integrity framework that cannot be achieved by individuals:

> *Corruption analysts tend to look beyond individuals to institutions ... virtuous individuals are a scarce commodity and friends of integrity should not rely on or presume that virtuous individuals will always be in place to safeguard integrity. More reliable are institutions or indeed a framework of institutions which can hold misconduct in check.* (Uhr 2005:202)

The roles of different types of accountability agencies and the concept of an 'integrity system' are the subject of the next section of this review.

## Accountability agencies and integrity systems

Jeremy Pope developed the concept of a national integrity system. He famously described the institutions and practices of integrity in metaphorical terms as a Greek temple: *'a temple with a roof - the nation's integrity, supported at either end by a series of pillars, each being an individual element of the National Integrity System'* (Pope 2000:36).

The most significant academic work on accountability agencies and integrity systems in Australia began with the National Integrity System Assessment (NISA) conducted in 1999-2005. The Australian NISA project was developed using Pope's concept of an 'integrity system' in its attempt to 'map' the country's integrity systems in order to

understand the interactions within the system, identify strengths and weaknesses and understand what actions could ensure the best possible integrity systems were developed and maintained (NISA 2005:1). Findings from the NISA research have been widely published and have had enormous influence on current thinking about how to conceptualise and assess the effectiveness of integrity and anti-corruption policies and structures in Australia.

This review relies extensively on the findings of the Australian NISA project in its various iterations to establish the next part of theoretical framework for this thesis. Of particular relevance to this analysis of the ways in which accountability agencies approach their roles under whistleblower protection legislation in Australia, is the conception of integrity mechanisms as a system rather than individual and independent organisations, rules and practices.

The NISA findings are also relevant because elements of the assessment framework utilised in the project are adopted in this thesis. The NISA project encompassed some research into integrity in the private sector, but this aspect of the project is largely ignored because of the focus in this thesis on public sector ethics and accountability.

The review proceeds in the following ways: first, the roles of oversight agencies as 'core' integrity institutions are established; second, the arguments for considering integrity mechanisms as a system and the significance of this approach are analysed; third is an analysis of the concept of 'distributed integrity,' which is fundamental to understanding integrity as a system. Writing by John Braithwaite (in particular, Braithwaite 1998) reintroduces the concept of trust as an essential component of the successful institutionalisation of 'distributed integrity'. Finally, the impact of the practice of 'distributed integrity' on Australian public sector whistleblowing is then theorised in order to complete the framework for analysing the experience of whistleblowers who make disclosures to accountability agencies.

This thesis uses 'departments' and 'departmental' to describe all line agencies and their actions. Of course not all of these agencies are departments, some are in fact local government authorities, but they are aggregated for two reasons. First, the participation by public sector organisations in the 'Whistling While They Work' (WWTW) research was contingent on the identity of those organisations remaining confidential and every

effort has been made in this thesis to respect that agreement. In addition, the appellation 'department' signifies their role in the public sector as a 'line agency' but ensures a clear distinction from 'accountability agency'.

## 'Core' accountability agencies

Within the public sector a number of review and audit agencies scrutinise the conduct of other departments and public servants making them publicly accountable. Mulgan describes this as '*compounded accountability'*- agencies who are themselves accountable for holding someone else to account (Mulgan 2003: 29). Whereas Pope described 'core' tools, the Australian NISA project refers to 'core', 'peripheral' and 'specialist' integrity institutions (see for example Smith 2004:2, Brown 2008:171). The 'core' agencies are said to play a key role in the development of integrity systems and in ensuring such systems are working (Brown 2008:171). The 'core' agencies have the primary responsibility for external whistleblowing in the States under consideration as they are agencies to which any public servant can report[1]. They are the generalist investigative agencies – audit offices, ombudsmen and corruption and/or crime commissions (Smith 2004:7-8) and the public service employment/standards commissions. It is important to understand their specific roles and responsibilities.

While their jurisdictional focus is different (see below) these agencies do have important common characteristics. The independence of the office is protected by the head of the agency being a statutory officer with direct responsibility to the Parliament rather than the government of the day. Each type of agency has the power to publish reports publicly, through Parliament, on the results of inquiries, audits or investigations which include recommendations. None 'exercise formal powers of rectification' (Mulgan 2003:87) but this is not to dismiss their effectiveness. As Mulgan points out, provision of information via accountability mechanisms is almost universal while comparatively few mechanisms include the final stage of rectification:

> *The lack of rectifying power does not totally cripple the effectiveness of an accountability agency. In a great many cases, public exposure and*

[1] Not considered in this thesis are the range of specialist integrity agencies with specific jurisdictions, such as complaints about health care, or peripheral agencies such as administrative review tribunals, privacy or anti-discrimination commissioners.

> *criticism of executive action are sufficient to prompt the relevant office-holders into taking remedial action on their own initiative. Indeed, the mere threat of such exposure and criticism is often enough.* (Mulgan 2003:111)

The effectiveness of these agencies is indicated not least by their enduring position and proliferation in public accountability systems.

### *Auditors-General*

'*Government auditors are the most longstanding specialised agencies of government accountability'* (Mulgan 2003:83). In New South Wales and Queensland the role was established in 1824 and in Western Australia in 1831 (Audit Office of New South Wales Annual Report 2007-08:1, Queensland Audit Office and Auditor General WA websites). Pope describes them as '*the fulcrum of a country's integrity system'* Pope 2000:75).

An auditor-general is an independent statutory officer accountable directly to the Parliament rather than the government of the day. An auditor general's traditional role is to provide '*an independent scrutiny of government and public-sector use of money and other resources*' (Taylor 1996 cited in De Martinis and Clark 2003:26). The role has expanded beyond financial auditing that focuses solely on the accuracy and regularity of accounts, to include performance audits aimed at ensuring the standards of probity and efficiency in the handling of a department's resources (Mulgan 2003:83-90). Performance audits may in some cases extend to an evaluation of the effectiveness of government programs. This area of an auditor's role is more problematic than the assurance of financial regularity and efficiency since evaluations of policy effectiveness necessarily include '*judgements about social and political values and which may therefore be beyond the auditors' professional competence*' (Mulgan 2003:89).

Disclosures by whistleblowers to auditors-general are generally categorised as relating to serious and substantial waste of public resources.

### *Ombudsmen*

The function of 'ombudsman' is also well established (see Pope 2000:83) with offices established in New South Wales, Queensland and Western Australia in the 1970s. The traditional role of ombudsmen in Australia is the receipt and investigation of complaints

of maladministration by members of the public, focusing primarily on ensuring good administrative practice and fair decision-making. Each office has become increasingly proactive in the way it conducts its business, focusing not only on remediation of individual complaints but also on systemic improvements to public administration and standards of conduct not least through the publication of guidelines and the provision of training courses (see for example NSW Ombudsman and Queensland Ombudsman websites).

While there is some variance in the extent of an ombudsman's jurisdiction (the NSW Ombudsman for example having jurisdiction over non-government providers of community services to children and people with disabilities), the 'core' or traditional roles are consistent across State boundaries. With the commencement of whistleblower protection laws in their States, each ombudsman was empowered to deal with protected disclosures alleging maladministration by public authorities. Only in New South Wales, was the ombudsman's jurisdiction extended and this is an explicit role in the investigation of allegations of reprisals against whistleblowers.

### *Corruption commissions*

Anti-corruption commissions are by contrast with auditors-general and ombudsmen a relatively new institutional integrity structure. The Independent Commission Against Corruption (ICAC) was established in New South Wales in 1988, Western Australia's Official Corruption Commission in 1989 and the Criminal Justice Commission in Queensland in 1990 (Brown and Head 2004:4). The jurisdiction of the agencies in Western Australia and Queensland are somewhat different from the ICAC in that their role is not only the investigation and prevention of corruption, but also the investigation of organised and official crime, and crime research (Head and Brown 2004:4). For ease of reference in this thesis, members of this 'family' of oversight agencies are called 'corruption commissions'.

Effectively operating as standing Royal Commissions, corruption commissions, like ombudsmen, have significant coercive powers to assist in investigations, including powers to summon witnesses, require evidence under oath even when it is self-incriminating, and to enter and search premises. Corruption commissions have additional legal authority to use surveillance devices such as listening devices or

telephone intercepts. Unlike ombudsmen, whose inquiries and hearings are generally held out of the public eye, corruption commissions may publicise a major inquiry and hold public hearings.

The relationship of corruption commissions to those who provide them with information is also somewhat different from ombudsmen. Corruption commissions treat complaints as intelligence information and, as will become clear from the analysis of empirical data, are not necessarily concerned with the resolution of the individual's problem or indeed, keeping them informed about the outcome of complaints or disclosures they have made. Nonetheless, whistleblower protection legislation makes these agencies the proper authority for receipt of disclosures about corrupt or illegal conduct.

### *Public service commissions*

The names and structures of public service commissions have changed over the years, but the primary role has not fundamentally altered. Queensland and Western Australia each have such an agency, but there is no equivalent in New South Wales (see below).

These commissions do not have investigative or coercive powers like the 'core' integrity institutions described above, but they do have important legislated roles in promoting standards of integrity and ethical performance in the public sector in their jurisdictions, and monitoring compliance with standards and the law. The NISA Final Report considers them 'distributed' integrity institutions (NISA Final Report 2005:22) rather than 'core' institutions. Their role is considered here because both agencies were given specific responsibilities under the relevant protected disclosure legislation, roles related to the development of reporting guidelines and the investigation of reprisals against whistleblowers.

There has been no equivalent structure in New South Wales since 1988 when the Public Service Board was disbanded and the then Public Employment Office was established as a branch within the Premier's Department, functioning primarily as a workforce planning unit (NSW Premier's Department).

As Brown and Head state, independent watchdog or oversight agencies have played increasingly significant roles in integrity systems since the 1970s, being both '*major repositories of institutional capacity as well as political symbols in government efforts*

*to promote integrity and fight corruption.*'(Brown and Head 2004:3). What has become clear from this review is that recent academic writing in this area acknowledges this fact, but also emphasises the importance of an integrity system. This concept is the subject of the next section of this review.

## An integrity system

The concept of a 'national integrity system' (NIS) was developed by Pope and promoted in the Transparency International (TI) Source Book first published in 1996, in recognition of the need for:

> *...an holistic approach to any anti-corruption reform programme. It also recognises that every society, in whatever stage of development, has evolved a series of institutions and practices that collectively serve as its national integrity system.'* (Pope 2000:vii)

The introduction to the Australian NISA project draws on Pope's work:

> *Australia's 'National Integrity Systems' are the sum total of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power in modern Australian society. Integrity systems function to ensure that power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned.* (NISA Final Report 2005:1)

Some of the pillars that hold up the roof in the Greek temple metaphor are the structural elements of an integrity system including, for example, Parliament, an independent judiciary, a range of oversight or watchdog agencies, free media and civil society. One of Pope's pillars also represents the 'core tools' which the institutions need if they are to be effective, for example, freedom of speech, independence, access to information as well as enforceable and enforced laws. Pope theorised that even when the pillars were of different strengths, their interdependence would enable another or other pillars to take an increased load should one weaken. Only the failure of a critical mass of pillars would destroy the structure that maintains 'national integrity' (Pope 2000:36-37).

However, while institutions and processes may appear to be in place, their capacity to promote integrity may be limited, or non-existent (Brown and Uhr 2004:2); the pillars may be only facades, or 'hollow' (Larmour & Barcham cited in Brown and Uhr 2004:11). In fact:

> *...the ways in which these institutions and practices interrelate and combine, or fail to do so, provides a more important test of an integrity system than their mere presence.* (Smith 2005:54)

The Australian NISA project was much more than the compilation of a list of preferred or usual institutions as the basis for analysing what the successful institutionalisation of an integrity system (Brown and Uhr 2004:5).The assessment framework included the dimensions of institutional *capacity* to achieve their goals, the *coherence* of the institutional relationships and the *consequences* or achievements of integrity systems.

As part of the Australian NISA project, Rodney Smith mapped the New South Wales public integrity system using this capacity, coherence and consequences framework. Smith found that from 'a bird's eye view', the NSW integrity system was relatively coherent with established and cooperative relationships between the integrity agencies - with the rider that this was based '*on the measure of their own judgements'* (Smith 2005:56-57). The stronger critics of the levels of coordination and cooperation were the line agencies:

> *...which seemed to feel the consequences of a lack of coordination more sharply.* (Smith 2005:57)

Following on from Smith's mapping, Sampford, Smith and Brown changed Pope's Greek temple metaphor and described the relationships between institutions as a '*bird's nest*'. This re-conceptualisation still emphasises the interdependence of institutions on each other but the emphasis changes with the foregrounding of institutional relationships, constitutional, policy and operational. The power of the 'bird's nest' metaphor is in its recognition of the intricate but inherently messy structure of such relationships and the need to map them as well as the existence of institutions (Sampford, Smith and Brown 2005: 104-5). Individual agencies are still conceived as weak in their own right, mere 'twigs' but once built into a single structure, the nest, the system then has the capacity to protect the delicate 'egg' of public integrity.

Of additional fundamental importance to an integrity system, is that the power of each element is in balance with the others and that each is discharging its purposes and responsibilities (Brown and Uhr 2004:14). One of the institutional relationships in an integrity system is therefore accountability. Pope focuses on 'horizontal' rather than 'vertical' accountability, to guard against the possibility of totalitarian regime having

the power to undermine or pervert 'pillars' of integrity. This 'virtuous circle' is one in which each institution or actor holds the others to account as well as being accountable themselves thereby creating a system of '*agencies of restraint and watch-dogs ... designed to check abuses of power by other agencies and branches of government*' (Pope 2000:33-34). Pope was of course not alone in conceiving of this answer to the question of 'Who guards the guardians?'. For example, Braithwaite writes about a 'republican' or circular model of trust and accountability as the logical and simple solution to the puzzle of infinite regress (the potential need for an endless supply of guardians to check abuse by a lower order guardian) in a hierarchical conception of guardianship (Braithwaite 1998:354). Mulgan too conceives 'mutual' or 'compounded' accountability as the resolution to this puzzle (Mulgan 2003:25-29 and 232).

The next section takes up the task of analysing implications of virtuous circles/ institutionalised distrust/mutual accountability together with the concept of 'distributed integrity'.

### *'Distributed integrity' institutions and their limitations*

As noted above, in Pope's 'Greek temple' metaphor, one of the pillars represents the 'core tools' which the institutions need if they are to be effective in fighting corruption and promoting integrity. As Mulgan (2003) as well as Brown and Head (2004) observe, the promotion and strengthening of integrity within organisations is a question of institutional design:

> *Is institutional accountability best achieved through centralised concentration of control or dispersed power and delegated responsibilities? Does external scrutiny militate against professional trust and efficiency among the staff of an organisation?* (Mulgan 2003:5)

As Brown and Head go on to say, '*[i]ntegrity systems ... also include the 'distributed' integrity processes running through the management of all well run organisations'* (Brown and Head 2004:3).

The importance of trust between individuals and within organisations has already been contemplated in this review. The concept of 'distributed integrity' brings into focus a different element of trust as a relational concept, this time in the relationships between external accountability agencies and departments.

One of the aims of the NISA project was to assess the capacity of integrity systems. The capacity of 'core' accountability agencies is constrained by the available resources and the workload of such agencies (Brown and Head 2004:18). For these reasons, accountability agencies need to rely on the capacity of departments to investigate and resolve allegations of wrongdoing themselves. This strategy has, overall, both positive and negative impacts. This thesis will show that the impact on whistleblowers is largely negative.

First, it is likely that departmental managers will be aware of integrity breaches or risks before they come to the attention of 'core' agencies (Brown 2008:171). Much of the information on which 'core' agencies rely, both in identifying misconduct and in gathering relevant evidence, comes from within departments. Cooperative relationships between departments and 'core' agencies are therefore extremely important in facilitating the flow of accurate and timely information. One of the aims of whistleblower legislation is to encourage the reporting of wrongdoing. This thesis will show that most accountability agencies make little effort to encourage whistleblowers to report to them, offering limited information and advice about the processes or implications of making a disclosure.

A further benefit of cooperative relationships between departments and accountability agencies is that working closely with departmental staff can resolve difficulties that arise simply from accountability agencies being outsiders:

> *By cooperating closely with internal auditors, the government auditors are able to extend their influence much further into the inner workings of agencies.* (Mulgan 2003:85)

The point is confirmed by Grabosky:

> *Perhaps the greatest virtue of an in-house compliance unit is the potential for its personnel to develop intimate familiarity with the practices and procedures of the organisation (Downs 1967:148-151). Such inside knowledge is rarely achievable by outside inspectors.* (Grabosky 1998:308)

Mulgan's statement directs us to the most important benefit of involving departmental staff in integrity issues: encouraging and supporting departmental managers to take responsibility for the promotion of an ethical and accountable culture in their own workplaces (Brown and Head 2005:18). As the NISA Final Report states:

> *…it is well-established throughout the theory and practice of Australian governance that bigger and better 'watchdog' agencies will never alone ensure higher levels of integrity… the institutionalisation of integrity is dependent on positive leadership and the ability of management to set and maintain appropriate ethical standards with the participation of staff, clients and the general public. While Australian integrity systems rely, in part, on a range of agencies with extremely strong legal powers of investigation and oversight, in practice, the role of central agencies is at least as important as a supportive resource for those working in organisations to achieve coordinated outcomes 'on the ground' as agents of regulation and enforcement.* (NISA Final Report 2005:83)

One of the participants in Smith's research into the New South Wales integrity system confirms this point:

> *[W]e encourage the public sector to take responsibility for their integrity issues… [A]t the end of the day, it's for them to build their integrity systems and we'll help them with that but we can't be the enforcer of integrity in their organisations because that's got to come from within – it won't work if it comes from outside. And that's why you get such a good outcome following an investigation because then you've got the CEO's attention. It relates back to the leadership issue.* (Smith 2008:116)

While investigations might get the attention of the CEO, accountability agencies informally refer the majority of matters back to the responsible department with very little in the way of ongoing oversight. The analysis of empirical data in this thesis demonstrates that too much informal reliance on the 'distributed integrity' within departments can be extremely problematic for whistleblowers.

This raises another important element of 'distributed' integrity: it is not solely a matter of 'letting the managers manage'. The right institutional arrangements are essential and they are not just about the free flow of information. Whistleblower protection legislation aims to encourage the reporting of wrongdoing and its proper investigation. As Bovens remarks, 'whistleblowing *helps only when whistleblowers are listened to*' (Bovens 1998:198). There is much agreement that the most effective institutional arrangements for the resolution of integrity breaches rely first on voluntary or informal arrangements between 'core' agencies and departments but backed up by more formal, possibly coercive, powers that can be employed when necessary to strengthen internal integrity systems or to bring about wider cultural change (Grabosky 1998:311, Smith 2008:116).

Striking the right balance between coercive external oversight and voluntary compliance is a key issue in institutional and accountability framework designs (Braithwaite 1998, Mulgan 2003).

The focus of accountability agencies on first supporting departments to improve their own integrity systems 'through dialogue and persuasion' and resorting to invasive and coercive investigations when either this strategy fails or there is evidence of a serious or systemic breach of trust and ethical conduct, is held to be the right balance (Braithwaite 1998:351, NISA Final Report 2005:83).

In practice there is a middle path where the majority of matters are referred by accountability agencies back to departments for inquiry and resolution:

> *Here again, the institutional answer is not 'black or white' — not a question of all internal complaint-handling or all external scrutiny — but an appropriate balance. While some anti-corruption commissions were established as entirely independent, they have since spent years building relationships with line agencies so that the latter can take responsibility for routine investigations, reserving their own resources for serious matters. On the other hand, ombudsman's offices tended traditionally to rely heavily on agencies' internal capacity, but in recent years have tended to develop their own independent capacity.* (Brown and Head 2005:85-92)

As already noted, whistleblowers who disclose externally to accountability agencies do so following breaches of their trust in and loyalty to their own departments. For their disclosures, and in fact allegations of reprisals being taken against them, to be referred back to the self-same department with no ongoing involvement by accountability agencies is akin, as one whistleblower in this study pithily observed, to *'putting Dracula in charge of the blood bank'* (Anna). Dracula or not, departments which have already demonstrated a level of untrustworthiness require a degree of oversight which is higher up Braithwaite's regulatory pyramid than appears to have been recognised in the cases examined in this thesis. The analysis of the experiences of whistleblowers who make disclosures to accountability agencies allows us to examine the effect of 'distributed integrity' in practice.

Before moving on to the analysis of empirical data, however, the final step in this review is to refine the concepts of 'whistleblower' and whistleblowing'.

## Whistleblowers

Some of the points that need to be made about whistleblowing as it is analysed in this thesis have already been raised in this review, particularly what they can disclose and to whom and the consequent roles of those to whom disclosures are made. There is a growing body of academic literature on different aspects of whistleblowing and whistleblowers. Some examples of this include research into the personality of whistleblowers (Near and Miceli 1996), predictors of whistleblowing (Ponemon 1994, Near et al 2004, Mesmer-Magnus and Viswesveran 2005), organisational theory (Dozier & Miceli 1985, Near and Miceli 1986, Miethe and Rothschild 1994, Berry 2004) and business ethics (Near and Miceli 1985). The section below does not systematically canvass all the literature but focuses on defining the concept itself, confirming its relevance to improving accountability and integrity and canvassing the issues of reprisals or retaliation and the possibility of protecting whistleblowers.

### What is whistleblowing?

One way to approach a definition of whistleblowing is to begin with the thoughts of those involved in either blowing the whistle or dealing with disclosures. Two participants in the WWTW research had strong views on what whistleblowing is and who might be a whistleblower– the first a manager and the second a whistleblower – both of whom questioned the need to single out and label those who report wrongdoing in their workplace:

> *I do have some difficulty personally with the title, 'whistle blowing'. I think it has a connotation that it makes the person special. Sometimes, only in their mind or in other's minds that they're unwell or distrustful or they're something else. I'm not sure what you would actually call somebody or whether you have to call them anything at all … It's an area that might need some extra work, I think.* (Manager_1_WA)

> *I would just like to put on the record that I don't like the term whistleblower. I don't really understand why we need to give labels to anybody. The example I would use is, in the workplace my understanding is that everyone, for example, has an obligation to report occupational hazards so that we have a safe workplace. But if you report that, you're not labelled as a hazard blower or something. So I don't really understand, given that we all have a responsibility to have equally a fair and corrupt-free workplace, why anybody who reports*

> *conduct that they think is unfair or potentially corrupt, why they need a label. So I don't like the term.* (Anna[2])

The manager dissolves completely the notion of whistleblowing as a distinctive activity. Anna, on the other hand, acknowledges the particular role in disclosing corruption and wrongdoing arguing only with the label. Although I generally agree with the underlying logic of Anna's comment, it is still helpful to identify how whistleblowing differs from other accountability mechanism. I have referred to whistleblowers throughout this thesis because as the manager states, there is no other ready collective description for the large numbers of Australian public servants - an estimated 12% over a 2-year period (Smith 2010:719) - who have taken the risk of speaking out in order to improve standards of conduct and ethics in their workplaces. The term does at least bring clear focus to the actions of these employees.

While there is no universal consensus on a definition of a whistleblower, Janet Near and Marcia Miceli's definition has been widely accepted, particularly for the purposes of academic research:

> *...the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.* (Near and Miceli 1985:4)

This definition is the one adopted in this thesis. A pragmatic reason is that it is the definition largely used by the WWTW project[3] within whose auspices this thesis was written. It is also a definition widely used by academic researchers in the United States (Miethe and Rothschild 1994:323, Miceli and Near 2002:456). There are also strong

[2] Anna also stated that she did not like the title of the research project:

> I actually don't like the first part of the title of this research, the part that starts 'whistling while they work'. I think it's tacky and I think it's trivial… I thought that perhaps what I have to say or report would be seen as trivial as well. But, nevertheless, I got past that. Having a background in communications and marketing I understand that, you know, probably some marketing department or someone trying to think like a marketer came up with the term. So I have moved past that, but I just wanted to put it on the record that I don't think it was an appropriate first part of the title and maybe it did turn some people off actually participating.

[3] The WWTW project excluded 'role reporters', for example internal auditors, from its definition of whistleblowers while Miceli and Near include these employees (Smith 2010, Brown et al 2008, Miceli and Near 2002).

theoretical arguments for its use. Not least of these arguments is that the definition encapsulates the four essential elements of the process of whistleblowing: '*the whistle-blower, the whistleblowing act or complaint, the party to whom the complaint is made, and the organization against which the complaint is lodged*' (Near and Miceli 1985:2).

The definition restricts the term 'whistleblower' to 'former or current' organisation members, rather than including anyone who gives evidence about wrong-doing within an organisation. The particular significance of a whistleblower is their proximity to relevant evidence and their capacity to provide information that may assist in rectifying the wrongdoing (Miethe 1999:24-26, Jubb 1999:81, Lewis 2001:170, Miceli et al 2009:392). While anyone who reports wrongdoing should be protected (Lewis 2001:173) whistleblower legislation is generally seen as providing special protection for employees who are vulnerable to retaliation from their employer (Miethe 1999:73-78, Brown and Latimer 2008:228-9). There is, however, no consistency in the legislation in the States under consideration in this thesis on this point, with only the NSW Protected Disclosures Act being fully consistent with the definition. In Queensland 'any person' can be protected for reporting in certain circumstances and in Western Australia any person can be protected for making a disclosure about any public interest wrongdoing (Brown and Latimer 2008:229-30). Since the respondents to the WWTW Internal Witness survey were current or former employees of a department, there was no practical difficulty in applying the more restrictive definition in this thesis.

The disagreement about definitions of a whistleblower has commonly been based on whether disclosures made within an organisation should be included. There is a body of opinion that only those who make public disclosures can be considered whistleblowers (see for example, Glazer and Glazer 1989, Grabosky 1991, Jubb 1999, Alford 2001, Grant 2002). Those who bring their disclosures to the attention of their supervisors or other more senior members of an organisation are seen to be engaged in a process that is an integral and legitimate part of their job (Jubb 1999). Jubb notes that internal disclosures may breach loyalty to colleagues, through informing on their wrongdoing, but are made with the intention of attracting the organisation's attention to the wrongdoing and therefore do not include the element of dissent from organisational values and '*fail to create the crucial dilemma'*. The loyalty to a wider 'constituency'

involves *'the irretrievable step'* of disclosure to an external entity, dissenting from organisational loyalty, and is according to Jubb, '*the true essence of whistleblowing*' (Jubb 1999:77-94).

This proposition is not accepted in this thesis on the basis that the true essence of whistleblowing is the disclosure of wrongdoing by an employee in order to have it stopped (Rehg et al 2008:222). As has been discussed above, organisations themselves are often in the best position not only to take corrective action, but also to take steps to improve ethical standards of conduct within the organisation. Loyalty to the 'public interest' does not necessarily require disloyalty to an individual department. To describe only those who report externally as whistleblowers inclines towards the stereotypical view of whistleblowing as a relatively rare phenomena, and ignores the increasing number of employees who are willing to report wrongdoing internally (Near and Miceli 1996:507, Brown, Mazurski and Olsen 2008:27-31).

Smith's challenge to the stereotypical views of whistleblowers and organisations makes the point that '*it presents no hope of change for the better*' and tends to ignore the possibility of improving organisations, promoting whistleblowers and improving '*the lot*' of whistleblowers. He makes another valuable observation that '*studies on which the clichéd view is based can do little but confirm a negative picture of whistle-blowing because that outcome is built into their methodologies from the outset*' (Smith 2010:707). While many of the experiences of the whistleblowers in this study are negative, my focus is on the possibilities for reform offered by analysis of their experiences.

This brings us to a further point about the purpose of whistleblower legislation. One of its aims is to encourage reporting, in effect normalising the activity of disclosing wrongdoing. In this context, it is not useful to consider whistleblowers as '*saints of secular culture*' (Grant 2002:391) but rather as diligent ordinary employees doing their best. This view of whistleblowers is supported by the WWTW research which found little statistical difference in the personal characteristics of whistleblowers and non-reporters. There was little to differentiate the two groups in terms of measures of 'perceived diligence', and some evidence that whistleblowers hold views consistent with higher organisational citizenship and more positive views about whistleblowing

generally. Whistleblowers did, however, indicate somewhat less trust in management and the protective power of whistleblower legislation. In light of these finding, the researchers conclude that '*there are good reasons to believe that explanations for variations in reporting behaviour are more likely to lie outside the individual in other circumstances…*' (Wortley, Cassematis and Donkin 2008:62).

The above discussion about whistleblowing, and earlier sections on accountability and integrity, has raised some issues about the role of whistleblowing in systems of accountability and integrity. It is not my intention to repeat the discussion here, but rather to emphasise some of the propositions that underlie the analysis of empirical data that follows, particularly the impact of whistleblowing on ethical conduct in public sector departments, and the implications for action by external accountability agencies.

## The role of whistleblowers in accountability/integrity systems

Whistleblowers are a mechanism of accountability (Mulgan 2008:30 and 144) with individual or personal accountability for providing information to those with the power and authority to investigate, and if necessary impose remedies or sanctions. Whistleblowing is an attempt to influence someone in authority to end the perceived wrongdoing (Rehg et al 2008:235). Bovens refers to this as a '*pragmatic instrumental consideration'* noting that whistleblowing can be an expression of citizenship - an important source of information but also an important signal because *'... criticism demands an answer, a justification of the existing situation and thus forces the organisation to think about its policy'* (Bovens 1998: 195-7). The response to a disclosure may in fact be more important than whether the whistleblower is right or wrong (Alford 2001:28-9).

The findings of the WWTW Employee Survey indicate that Australian public sector departments often respond well to disclosures, instigating investigations in 65 per cent of cases and achieving improvements as a result of 56 per cent of these investigations. The results of the Internal Witness Survey were however less positive, with only 22 per cent of respondents reporting improved outcomes despite investigations of about 75 per cent confirming wrongdoing (Smith and Brown 2008:113-117, Smith 2010:714). Smith and Brown did not specifically disaggregate the impact of external accountability agencies on the achievement of better outcomes. However, their analysis of the Internal

Witness Survey results reveals that further investigations resulted in changed outcomes in only about ten per cent of cases and high levels of dissatisfaction for whistleblowers – more than 80 per cent reporting being not very or not at all satisfied (Smith and Brown 2008:117-118). Given that less than three per cent of respondents reported to an external agency initially, and only about ten per cent reported externally at any stage of the process (Donkin et al 2008:90-91) the effectiveness of accountability agencies seems to be quite limited.

Previous research and theory indicates some differential impact of external and internal whistleblowing. Reporting externally may be more effective in triggering investigations and remedial action (Dworkin and Baucus 1998). Certainly external accountability agencies can exert influence on senior management to ensure wrongdoing stops and further misconduct is avoided (Miceli *et al* 2009: 382-2). The NISA project found that the handling of integrity issues in New South Wales had improved over a ten year period in part because of the activities of external accountability agencies (Smith 2008:116-117). However, as discussed above, the positive impact of an external agency on improving the ethical culture within a department, as opposed to improving compliance with legal and procedural rules, is less clear (Jos 1991:106-107 and 111).

The parliamentary debates about the form and purpose of whistleblower protection legislation analysed in detail in the next chapter emphasise whistleblowing as an element in improving the culture and accountability of public sector departments. Relevant again at this point is Weaver's work on virtue in organisations and moral identity. He posits that organisations can influence the development of moral identity by encouraging employees to act 'virtuously' because behaving morally reinforces moral identity, making it central to one's self-concept as a moral agent – a 'virtuous circle' (Weaver 2006:351). This 'virtuous circle' is the personalised version of Pope's virtuous circle of compounded accountability (see above). How organisations might provide opportunities for developing moral identity and practising moral agency is the question (Weaver 006:359) and the purpose of accountability (see above). Blowing the whistle to an external accountability agency is a way of connecting these two virtuous circles – an employee exercises personal moral agency by reporting to an agency whose role and

responsibility it is to ensure and promote the accountability and ethical standards of another organisation.

The appropriate immediate practical response to a whistleblower's disclosure, both by departments and external accountability agencies, would be to respond by investigating the allegations and taking any necessary corrective action as quickly as possible (Miceli *et al* 2009:379) thereby using the whistleblowing as a preventive and detective control (Hooks 1994 cited by Poneman 1994:118) and confirming their moral agency. The analysis of empirical data in this thesis indicates that external accountability agencies, constrained by resource limitations, existing priorities and the public interest threshold test for protected disclosures, do not take the opportunity opened by whistleblowers' disclosures to confirm or support the ethical or moral behaviour of the whistleblower or to influence departmental culture. Bearing in mind that the majority of whistleblowers report externally only when their trust in their own department has been breached by insufficient action being taken on their disclosures and/or experiencing reprisals for making a disclosure, this action is tantamount to a further breach of trust. By referring disclosures back to departments with little or no further oversight, external accountability agencies demonstrate agreement with existing standards of conduct and culture within those departments. In doing so, they disconnect the two virtuous circles. They also fail to achieve one of the aims of whistleblower legislation – the protection of whistleblowers. Reprisals and retaliation against whistleblowers is the subject of the final section of this review.

## Reprisals and retaliation against whistleblowers

### *Types and frequency of reprisals and poor treatment*

There are some commentators who believe that someone who discloses wrongdoing is not a whistleblower unless s/he suffers reprisals:

> *In theory, anyone who speaks out in the name of the public good within the organization is a whistleblower. In practice, the whistleblower is defined by the retaliation he or she receives.* (Alford 2001:18)

Similarly, De Maria, who conducted research in Queensland in the 1990s claims: '*the non-suffering whistleblower is a contradiction in terms*' (De Maria 1999:25).

This argument is not accepted in this thesis. Empirical research conducted in the US (see for example Near & Miceli 1986; Perry 1990, Near, Ryan & Miceli 1995) and in Australia by the WWTW project (Smith and Brown 2008:127-128) does not support the proposition that reprisals are an essential component of whistleblowing. This is not to say, however, that reprisals and retaliation are not far too common an experience of whistleblowers.

Smith and Brown's analysis of WWTW data concludes that 20-25 per cent of whistleblowers in the Australian public sector are treated badly as a result of their reporting (Smith and Brown 2008:124). Noting that this estimate is an average, they also report that rates of reprisal and retaliation vary widely between organisations, 36-50 per cent of whistleblowers in five of 55 departments reporting being treated badly by management, a much higher rate than the average (Smith and Brown 2008:125-126). What also becomes apparent is that whistleblowers who do experience reprisals are not likely to suffer a sole episode of bad treatment but rather a collation (Smith and Brown 2008:129), a finding consistent with research in the United States (Rothschild and Miethe 1999:120, Miethe 1999:76-77).

Whistleblowers experience a range of reprisals and retaliation with the most common being threats and intimidation, poor performance appraisals, ostracism, unsafe or humiliating work and even being made to work with wrongdoers (Miethe 1999:74-75, Smith and Brown 2008:128-129). These types of reprisals are quite informal but nonetheless undermine, discredit and discomfort the whistleblowers. More formal and drastic actions such as loss of entitlements, sacking, forced retirement, suspension or

demotion are more tangible and are likely to leave a paper trail of evidence. Commenting on the types of reprisals experienced by whistleblowers, Alford states:

> *Usually the whistleblower is not fired outright. The organization's goal is to disconnect the act of whistleblowing from the act of retaliation, which is why so much legislation to protect the whistleblower is practically irrelevant…The key organizational strategy is to transform an act of whistleblowing from an issue of policy and principle into an act of private disobedience and psychological disturbance.* (Alford 2001:31)

The impact of reprisals can include economic harm, loss of professional standing and a range of psychological injuries from increased stress to severe depression or anxiety (Rothschild and Miethe 1999:121).

### *The correlation between reporting externally and experiencing reprisals*

There is widespread agreement among academic researchers that reporting outside an organisation, whether to the media or to external regulators/oversight agencies, increases the risk of reprisals or retaliatory action being visited upon whistleblowers by management (Miethe and Rothschild 1998, Dworkin and Baucus 1998, Miethe 1999, Miceli *et al* 1999, Smith and Brown 2008, Rehg et al 2008). Two reasons are most frequency posited. The first is that reporting outside the organisation violates '*the sacred rule of keeping things "in house"'* (Miethe 1999:80) and is therefore a greater breach of loyalty than reporting internally:

> *The position of whistleblowers is… precarious. As in most groups with a strong degree of social or hierarchical control, the price for publicly breaking ranks is high. Complex organisations have at their disposal a range of formal and informal sanctions that in such cases can be imposed either publicly or in some more subtle way.* (Bovens 1998:192-3)

The second reason is that external reporting brings greater risks to the reputation of the organisation and therefore greater condemnation of the whistleblower (Miethe and Rothschild 1994:342, Rehg et al 2008:225).

Empirical research has tended to confirm the theory (Jos 1991:110, Glazer and Glazer 1989 cited by Miethe and Rothschild 1991:339, Miceli et al 1999:142, Miethe 1999:80, Brown and Olsen 2008:149). There is, however, a caveat. As the majority of whistleblowers use internal channels before reporting externally, it is not possible to explicitly conclude that going outside the organisation triggers the retaliation (Miceli et

al 1999:147). The experience of reprisals is a strong determinant of reporting externally (see above) and this may be the basis of the correlation between external reporting and increased experience of reprisals – external reporting follows reprisals '*with external involvement then perhaps contributing to this real or perceived mistreatment in many cases'* (Brown and Olsen 2008:151). Interview data analysed for this thesis confirms this proposition. No whistleblowers reported experiencing reprisals that they attributed to their reporting externally; in all cases the reprisals pre-dated the external report.

More than half of the whistleblowers interviewed who had reported to an external accountability agency had experienced reprisals, and continued to do so after making the external disclosure. By analysing the experiences of these whistleblowers this thesis provides insight into the response from accountability agencies to the allegations of reprisal action that for the most part were part of the disclosure of wrongdoing and not a separate report. This analysis indicates that accountability agencies take very little action in response to such allegations and therefore once again miss an opportunity to influence the ethical culture within departments and fail to take adequate steps to protect whistleblowers. This is a breach not only of the trust placed in them by individual whistleblowers but also by the parliaments which had developed legislative schemes that protected internal and external public interest disclosures in order to maximise the opportunities for wrongdoing to be exposed and rectified.

## Methodology

This thesis was written under the auspices of 'Whistling While They Work Enhancing the theory and practice of internal witness management in the Australian public sector' (WWTW), an Australian Research Council-funded Linkage project. WWTW was an extensive program of research into the management and protection whistleblowers conducted between 2005 and 2007 and across 304 public sector agencies from four jurisdictions – the Commonwealth, Queensland, New South Wales and Western Australia. I was one of the two 'project scholars' undertaking doctoral research and so this thesis utilises data collected by WWTW. My analysis is restricted to the three State jurisdictions which were involved in the project and does not include the Commonwealth. My reason for this is because the States are more comparable in terms

of government structures, legislative powers and departmental roles in the provision of services.

The empirical research was subject to ethical review by the Griffith University Human Research Ethics Committee (Reference GU LAW/10/05/HREC) and was conducted according to NH & MRC and Australian Vice-Chancellors' Committee guidelines including the National Statement on Ethical Conduct in Research Involving Humans. The ethics approval included agreement that no published results would identify particular information as coming from particular agencies or individuals, without their full consent.

An explanation of the scope of WWTW data collection is a necessary first step in setting out the methodology for my analysis of that data. The summary of data collection activities provided below is largely based on the introductory chapter of the WWTW Report (2008) and Rodney Smith (2010).

## Data collection

The WWTW study included seven separate quantitative surveys as well as qualitative data gathered through interviews with whistleblowers and departmental managers and case-handlers. Empirical data from each of these elements of the study were collected in the four jurisdictions. The short titles and basic features of the seven surveys were as follows:

Agency Survey: data on whistleblowing procedures and practices in 304 public sector agencies

Employee Survey: data on attitudes toward and experiences of wrongdoing and whistleblowing from a random sample of 7,663 public sector employees across 118 agencies (response rate 33%)

Internal Witness Survey: more detailed data on attitudes towards, and experiences of, wrongdoing and whistleblowing from a sample of 242 public sector whistle-blowers across 15 agencies (response rate 53%)

Case-handler Survey: data on attitudes, behaviour and experiences of 315 public sector staff with a specialist role in handling whistleblowers and whistleblower reports across 15 agencies (response rate 19%)

Manager Survey: data on attitudes, behaviour and experiences regarding whistle-blowing and whistleblowers of 513 public sector managers across 15 agencies (response rate 17%)

Integrity Agency Survey: data on practices and procedures for dealing with whistleblowers and whistleblowing in 16 public sector external accountability agencies

Integrity Agency Case-handler Survey: data on attitudes, behaviour, and experiences of 82 staff members with a specialist role in handling whistleblowers and whistleblower reports across 16 external public sector accountability agencies (response rate 27%).

The focus of the WWTW study was on public interest whistleblowing in the period July 2002 to June 2004. Six broad categories of wrongdoing were used:

1. misconduct for material gain (e.g., bribery or theft)
2. conflict of interest (e.g. failing to declare a financial interest)
3. improper or unprofessional behaviour (e.g. sexual harassment or racial discrimination)
4. defective administration (e.g. failure to correct serious mistakes)
5. waste or mismanagement of resources (e.g. wasteful or negligent purchases)
6. perverting justice or accountability (e.g. misleading reporting of agency activity).

A further category of wrongdoing was also analysed, reprisals against whistleblowers.

The surveys were administered between November 2005 (Agency Survey) and December 2007 (Case-handler, Manager, Integrity Agency, and Integrity Agency Case-handler Surveys). Full details of the survey instruments are available in the first project report '*Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*' (2008:16). The surveys themselves are available online at http://www.griffith.edu.au/law /whistleblowing/research.

An additional quantitative instrument was the assessment of the comprehensiveness of agency procedures for internal reporting and witness support. Of the 304 agencies which completed the first survey, 175 provided copies of their procedures. My role in

this element of the research was as part of the team that developed the 24-item rating scale based on existing literature and the Australian Standard *Whistleblower protection programs for entities*. I was also one of three researchers who then assessed the procedures. Having assessed a small sample, I suggested refinements to the initial rating scale which were agreed to by the WWTW Research Team.

The relationships between the WWTW data sets require a short explanation. The Agency Survey sought data on the extent, content and operation of whistleblowing procedures in departments and copies of the relevant procedures if departments chose to provide them. The survey was distributed to almost all departments in the four jurisdictions, a total of 793 departments, and resulted in 304 returns. A wide cross-section of government organisations was represented by the participating departments, including most major departments and statutory authorities, government-owned corporations, the military and local government authorities. The Integrity Agency Survey collected similar data from specialist 'integrity' agencies in each jurisdiction.

The largest data set is the Employee Survey which was a confidential, anonymous survey of a random sample of staff from 118 agencies, all of which had completed the Agency Survey. A total of 7663 public officials responded.

Further research was conducted with 15 'case study agencies' selected by the Research Team from 87 volunteers. The case study agencies included major departments and local government authorities which had already participated in the Agency and Employee Surveys, with responses representing 28 percent (n=2116) of the larger group. As such, the results of three further surveys are likely to be representative of organisational experience more generally.

These three further surveys conducted with case study agencies were an Internal Witness Survey, a Manager Survey and a Case-handler Survey, the last two utilising the same survey instrument. Invitations to participate in the Internal Witness Survey were distributed by internal advertisement within the agency, by direct contact from agency management and a number of integrity agencies with known whistleblowers relevant to the agencies. Surveys were received from 242 individuals, a far lower number of whistleblowers than the Employee Survey had revealed in these agencies.

The Manager and Case-handler surveys were questionnaires designed to elicit extensive and comparable information about the management practices and their experience of dealing with whistleblowing. Responses totalled 828 (13% of all surveys distributed) with 315 responses from case-handlers (many of whom also identified themselves as managers) and 513 from managers. The Integrity Agency Case-handler Survey was distributed to relevant staff from 12 external accountability agencies across the jurisdictions; it elicited 82 responses (27% response rate) from eight agencies. No staff from auditors-general offices in any State returned surveys.

The bulk of the survey results are quantitative, supplemented in reports by the WWTW project by qualitative material supplied by survey respondents as free text (WWTW 2008:20). I transcribed the free text responses to questions in four surveys: Internal Witness, Case-handler, Manager and Integrity Agency Case-handler.

The WWTW project focused on quantitative research methods:

> *...to paint a larger picture across thousands of individual reporting incidents, in order to help shift attention from whistleblowers as individuals to the performance of organisations in response to whistleblowing as a process.* (WWTW 2008:21)

This thesis focuses more closely on whistleblowers as individuals and their experiences of making disclosures to external accountability agencies. While the extensive quantitative WWTW data are extremely useful for identifying patterns and generating inferences and generalisations (Read and Marsh 2002), the meaning of whistleblowers' behaviour and experiences becomes more evident from a qualitative analysis of the data. I have therefore used a mixed or combined method using quantitative data to provide a broad framework in which to contextualise the qualitative analysis. Where the findings of this triangulation of methods are consistent, this method supports the 'generalisability' of the findings of my qualitative analysis. Where different interpretations are evident or possible, the qualitative analysis provides an opportunity to go beyond statistics and explore meaning (Cresswell 1994 cited in Read and Marsh 2002).

My major contribution to the WWTW project was in obtaining qualitative data. This data was gathered from interviews with whistleblowers, departmental managers and case-handlers. My role in this element of the research was as part of the team that

developed the two semi-structured interview schedules. I also conducted interviews with all but one of the NSW whistleblowers and one in Queensland and interviewed the majority of NSW managers and case-handlers. My contribution to the analysis of the data is explained further below.

The surveys distributed to these individuals included an invitation to volunteer for interview. The interviewees were, therefore, partly self-selecting. These interviews took place in person and by telephone between October 2007 and July 2009, with the majority of interviews being completed by November 2008. Across the three jurisdictions of interest in this thesis, fifty whistleblowers were interviewed and 29 managers and case-handlers. The breakdown was as follows:

**Table 2.1: Interviews with whistleblowers, departmental managers and case-handlers**

| | New South Wales | Queensland | Western Australia | Total |
|---|---|---|---|---|
| Whistleblowers | 22 | 16 | 12 | 50 |
| Managers/case-handlers | 10 | 11 | 8 | 29 |

The schedules for interviews with whistleblowers and departmental managers and case-handlers are attached at Appendices 1 and 2. The consent form, information sheet and advice about support services that were sent to whistleblowers before their interview are attached at Appendices 3, 4 and 5. Interviewees were all provided with a copy of the transcript of their interview and asked to confirm its accuracy or suggest amendments.

Whistleblowers who participated in the WWTW interviews have in this thesis been given pseudonyms. While managers and case-handlers are referred to by a coded number, it seems appropriate to acknowledge the individual whistleblowers by using a name. It also has the practical effect of making it easier to track individual stories through the thesis.

Additional material for this thesis was obtained from the annual reports and websites of accountability agencies as well as Hansard and specific whistleblower protection legislation in each of the jurisdictions in scope.

## Quantitative and qualitative analysis

Where the 'big' picture is important in establishing significant patterns, I have used the WWTW analysis of responses to the Employee Survey even though this includes responses from staff employed in Commonwealth departments which are not the subject of this thesis. I have, however, conducted my own quantitative analysis of responses to surveys of Internal Witnesses, Managers and Case-handlers and Integrity Agency Case-handlers excluding responses from Commonwealth agencies or staff. Any errors in this analysis are therefore entirely my responsibility.

Read and Marsh observe that when using combined methods, a researcher will privilege one set of results over the other, particularly when different methods produce different results. They also note that few researchers have the skills for both sophisticated statistical analysis on large data sets and in-depth interviews (Read and Marsh 2002). The different methods of analysis I have employed have not yielded different results so I have not had to grapple with questions arising from the privileging of one set of results over another. The triangulation of methods has served to increase the validity of each set of results and uses the advantages of both quantitative and qualitative paradigms (Cresswell 1994:178). In relation to the second observation however, my skills are without doubt more suited to qualitative analytical methods and my quantitative analysis has been largely restricted to frequencies.

I have conducted two forms of qualitative analysis of WWTW data, one specifically for the project and the other for my own work. For the project, I worked with a small team on developing a coding framework for use with the qualitative data analysis computer software 'NVivo'. Having coded a sample of interviews using a preliminary framework, I suggested some refinements to the framework which were agreed by the Research Team. Interview material as well as free text responses from surveys was coded in this way. The WWTW project did not propose to use the 'NVivo' coded material for analysis, but rather as a means of organising material, and retrieving it readily, for purpose of illustrating the quantitative analysis. I have not used the 'NVivo' coded

material for my own work, preferring to take a 'grounded theory' approach to the analysis of qualitative data.

### *Grounded theory*

I have used a 'grounded theory' approach to the analysis of interview and free text response material, particularly with the whistleblowers. This 'strategy for qualitative research' was pioneered by Barney Glaser and Anselm Strauss in the 1960s. Their focus was on developing a sociological method of systematically generating theory from data rather than using data only as a means to test hypothesis and verify theory (Glaser and Strauss 1967).

The initial appeal for me of using this approach to analysing whistleblowers' experiences was its reflexivity. Whistleblowers make external disclosures when their voices are not heard or they are not satisfied with the answers they receive (Bovens 1998:174). It therefore seems entirely apposite to approach analysis of their experiences by not starting with a hypothesis to be tested but rather focusing on a close analysis of what they actually say and developing a theoretical understanding from that.

My grounded theory approach started with line by line coding of data, the development of substantive categories out of this coding followed by writing up comparisons and connections arising from the data. The next step was to generate theoretical understanding based on the analysis of relationships between the categories. The conceptual framework that I developed, with its three core theoretical categories or themes, provides a systematic way of understanding the data. The core categories were 'accountability', 'distributed integrity' and 'trust'. At this point the quantitative framework for my qualitative analysis reasserted its importance by validating the categories I had developed from the data coding.

## Scope and limitations

This thesis draws heavily on responses from the Internal Witness, Manager and Case-handler and Integrity Agency Case-handler Surveys. It also uses the WWTW analysis of responses from the Employee Survey. Each of the surveys provides important data but they are not directly comparable. For example, the responses from the large representative sample of public sector staff can only be directly compared with the

whistleblowers' responses on the dimension of 'treatment by others in the workplace' (Smith and Brown 2008:110).

Compared with the Employee Survey, a much small and less representative sample of whistleblowers completed Internal Witness Survey. As noted above, these respondents largely self-selected in response to invitations issued by their department or an accountability agency with whom they had had contact. As Smith and Brown observe, the respondents to the Internal Witness Survey generally reported more negative experiences than the whistleblowers who responded to the Employee Survey. They hypothesise that those for whom whistleblowing was still a deeply felt part of their experience and identity were more likely to respond (Goyder 1987 cited by Smith and Brown 2008:112). It is also worth noting that as a result of whistleblowers being identified by integrity agencies a (very) small number of respondents to the Internal Witness Survey and interviewees no longer worked for the agency which had employed them at the time of their whistleblowing experience, leaving as a result of the experience. This too is likely to have contributed to the negative tone of the responses.

The Internal Witness survey was, however, very detailed and is the source of much rich data. The respondents to the Manager and Case-handler surveys were more representative than the whistleblowers but, like the whistleblowers, were sourced from the case study agencies rather than the larger sample of Employee Survey agencies. Smith and Brown observe that the surveys provide different but complementary evidence about the outcomes of whistleblowing but also note that the relationships between variables such as treatment by management and the likelihood of whistleblowers reporting again were often the same: '*in important ways, the three surveys tell the same story about whistleblowing outcomes*' (Smith and Brown 2008:112).

The analysis of the roles played by accountability agencies is based primarily on the views of whistleblowers and departmental managers and case-handlers. Where possible, the views of staff of the agencies are included using the responses to the Integrity Agency Case-handler Survey. The responses to the Integrity Agency Survey would potentially have provided a more detailed picture but few responses were received and not all the accountability agencies included in this thesis responded. This data was

therefore deemed too incomplete to be usable in this study. It is however acknowledged that this limits the complexity and richness of the analysis.

In order to restrict the definition of whistleblowing to the disclosure by staff members of matters involving the public interest, the WWTW project excluded from its analysis those respondents who were 'role' reporters, e.g. auditors for whom reporting is a normal part of their role (see above) and those whose reports were deemed to involve only personal and/or private interests (Brown, Mazurski and Olsen 2008:36-39). I have not made the distinction between public and private interests and therefore have included more whistleblowers within the scope of my study than the WWTW project. My reasons for this are two-fold.

Firstly, given that the public interest is not a consistent standard (see above) I do not believe that I can reliably attribute judgements about the threshold on behalf of accountability agencies. Where I have evidence of accountability agencies making this judgement I have used it. Secondly, all the experiences of public employees approaching accountability agencies to disclose wrongdoing contribute to the analysis of the extent to which these agencies are achieving the purposes of whistleblowing legislation. This is an approach that has been adopted in major empirical studies conducted in the United States, where all forms of organisational misconduct are considered the subject matter of whistleblowing and the categorisation depends on perceived seriousness and potential consequences (Miethe and Rothschild 1994, Collins 1989 cited in Dworkin and Baucus 1998, Miethe 1999, Miceli, Rehg, Near and Ryan 1999).

A further point to be made is that I have no way of knowing whether a whistleblower's allegations are true or not even if the disclosures appear to be about public interest wrongdoing. I have therefore had to rely on the whistleblower's interpretation of the accountability agency's response. This undoubtedly results in some harsh judgements about that response.

The usual caveats about use and conduct of interviews also apply. The data collected are influenced by the way questions are posed and the manner and context in which they were asked (Gomm 2004:150). A number of different researchers conducted the interviews. As noted above, I conducted the majority of interviews with NSW

respondents and one with a Queensland whistleblower; one interviewer conducted the majority of the Western Australian interviews and several researchers interviewed Queensland respondents. Although there were briefings about conducting the interviews the resultant data is quite variable, both in the length of the interview (ranging from 15 minutes to 90 minutes) and their quality. There are two main reasons for the differing length of interviews: in some cases it is due to the particular approach of the interviewer and in other cases to the willingness of interviewees to expand on their experiences and thoughts. This is typical for this kind of research. I have taken these differences into account in the analysis that follows.

The interests of the respondents might also need to be taken into account. As already noted, the set of whistleblowers generally reported more negative experiences than the more representative set of employees. Many of those interviewed spoke about drawn out and painful experiences which undoubtedly influences their perceptions of the roles played by others in those experiences and the outcomes. It is therefore highly likely that the data drawn from interviews is more negative again than the responses to the Internal Witness Survey. In this context though it is worth reporting that some whistleblowers declined to be interviewed on the grounds that their experience had been so appalling that they either did not wish to dredge it up again or they did not even trust the WWTW project with their stories.

Finally, while I consider the approach to have been very fruitful, my work is not a fully grounded data study, not least because the data collection was not an iterative process, due to the constraints of working within a much larger project. Glaser and Strauss, as well as more contemporary exponents of this approach such as Kathy Charmaz, recommend a process of theoretical sampling to identify elaborate and refine the categories developed from the data (Charmaz 2006:110) and then to collect data until these categories are 'saturated', variation within and gaps between categories are defined and data '*no longer sparks new theoretical insights, nor reveals new properties of these core theoretical categories'* (Charmaz 2006:113). I make no claim to having developed fully saturated theoretical categories and having therefore generated fully 'generalisable' theory. Nor am I unaware of the critiques of this methodology (for example, Burawoy 1991, cited by Charmaz 2006:133-135). However, as noted above,

the quantitative framework I have also used has provided confirmation of the validity of the theoretical categories I have developed.

My aim in taking this approach is to make sense of the complexities of individual experiences by piecing the evidence together in a way that provides insight into the rich story that a person tells about their own experience.

## Conclusion

This Chapter provides a coherent theoretical underpinning for the analysis of empirical data that follows. It has provided a detailed framework for understanding accountability in modern liberal democracies and the mechanisms for its achievement in an Australian context, in particular the roles of external oversight agencies and whistleblowers.

The specific roles and responsibilities of different types of accountability agencies are identified and then, using existing writing on integrity systems, the importance of placing them within a system of integrity is established. The effectiveness of these agencies is in their impact on ethical and accountable cultures within public sector departments and their reliance on these departments to take primary responsibility for the development and maintenance of such cultures, reserving their capacity for more formal intervention when influence fails. The importance of trust in this distributed integrity is established. The importance of the right institutional arrangements become evident from the analysis of the limitations of the practice of distributed integrity, including the inherent difficulties of influencing organisational culture from outside the organisation and the failure of accountability agencies to intervene when trust fails and the need for more coercive action is indicated. The implications of these limitations are particularly relevant to the analysis of empirical data in the following chapters.

Whistleblowers are analysed in this thesis as a mechanism of accountability responsible for providing information about integrity breaches that might not otherwise become available, with the responsibility for investigation and rectification belonging to institutions including both departments and accountability agencies. They are also conceptualised as demonstrating the core purpose of accountability – not just compliance with regulations and codes of conduct, but rather the development of moral

agents capable of resisting unethical behaviour and willing to take the risks associated with disloyalty, namely reprisals, in order to act on their own moral and ethical principles. The importance of trust, both in its breach when reprisals are experienced, and as a factor in a whistleblower's choice of reporting path has been conceptualised.

A mixed quantitative/qualitative approach to the analysis of empirical data obtained through the WWTW research provides not only broad patterns of whistleblowers' experiences but also the opportunity to go beyond statistics and explore the meaning of those experiences. Decisions to act according to moral and ethical principles are very individual, and the approach taken in this thesis emphasises the importance of understanding the personal experience of whistleblowing. Nonetheless, setting the legal and institutional framework for whistleblowing is a necessary first step, and this is the purpose of the next chapter.

# Chapter 3 Establishing external reporting paths

> If we are to produce a more civilised society, a more just society, it has to be based upon the truth. Because judgments which are not based upon the truth can only lead to outcomes which are themselves false. (Julian Assange)

## Introduction

Whistleblower protection legislation in each State under consideration in this thesis was enacted by governments elected on platforms that included commitments to improved accountability and transparency of government and bureaucracy. The significance of protecting witnesses to improper or illegal conduct by government officials was a feature of the debates in each parliament and the positions of all parties. In Western Australia, for example, the Leader of the House in the Legislative Council addressed the issue directly:

> *There is nothing more fundamental to ensuring openness and accountability in government than to ensure that people who have the courage to stand up and expose wrongdoing are able to do so without fear of reprisal.* (Chance, Hansard, 14/05/2002:10271b)

As will be shown, the implementation of whistleblower protection legislation in Queensland and Western Australia had roots in the context of major corruption scandals, concerns about government probity and subsequent royal commissions (Lewis 2004, De Maria 2006). In New South Wales there was no royal commission but rather a series of smaller but still significant scandals and a government elected on a reform platform. Rodney Tiffen observes that: '*scandals have often been the progenitors of policy change and institutional reform*' (Tiffin 1999:199). The attention focused on the transgressions of public trust revealed in political scandals and consequent demands for reform including improved accountability and corruption-resistant public administration no doubt influence the government's policy agenda (Tiffen 1999, Althaus et al 2007).

Despite the calls for reform, it will be shown that apart from codifying standards of conduct, in Queensland and Western Australia at least, the government in each State was generally satisfied with the capacity of the existing integrity system to combat integrity breaches. The identified gap was the protection of witnesses to wrongdoing. While parliamentarians criticised individual accountability agencies, debated the impossibility of protecting whistleblowers and pointed out that legislation alone would not prevent misconduct or improve the ethical culture of bureaucracies, ultimately reforms relied largely on institutionalising legal protections for whistleblowers making disclosures to identified authorities.

Although there are major differences between the provisions of the Acts, it is not the purpose of this chapter to review and compare the legislation generally. Such comparisons and reviews are available (see, for example, Lewis 2004, Latimer and Brown 2007, Brown, Latimer, McMillan and Wheeler 2008). This thesis focuses more tightly on the roles and responsibilities of accountability agencies and the extent to which they achieve the objectives of whistleblowing legislation in the relevant jurisdiction and so the analysis of the development of the legislation is similarly restricted.

The purpose of this chapter is twofold. The first is to analyse the context in which consideration of the need for whistleblower protection arose in Queensland, New South Wales and Western Australia and to identify the specific issues raised during the parliamentary process which had an impact on the final form of the legislation. Secondly, the chapter analyses the relevant provisions of each piece of legislation in order to detail the specific roles and responsibilities given to external accountability agencies.

What becomes evident is that the concerns of parliamentarians expressed during debate and the main objectives of the legislation were very similar in each jurisdiction, even when expressed differently. The aims of the legislation are: the encouragement of whistleblowing in the public interest, the proper investigation of the allegations made and the protection of whistleblowers. These aims are aligned with core concepts of accountability (Mulgan 2003). Whistleblowers provide an additional source of

information, encouraged to do so by the legislated protections and the authorities in receipt of their disclosures are responsible for the investigation of wrongdoing and its rectification, and in some cases ensuring the protection of whistleblowers through the investigation of reprisals.

Promoting ethical cultures within the bureaucracy was a major feature of debates, however, the final form of each Act seems to indicate that parliamentarians assumed that identifying these three objectives and setting out broad legal frameworks for reporting would of itself achieve this aim. These legal frameworks focus on compliance with specific regulatory requirements covering the making of disclosures and the response by agencies and departments. While the additional needs of whistleblowers were contemplated during consideration of establishing whistleblower support units or specific agencies to deal with whistleblowers, any such suggestions were rejected on the grounds of existing accountability structures being sufficient. Legislators assumed that whistleblowers would, like parliamentarians, view all reporting avenues as equal and choose the one most appropriate to their disclosure. No account was given of the emotional needs of whistleblowers caught in the conflicts of loyalty inherent in dissenting from organisation culture or their need to be able to trust those to whom they make disclosures.

The argument in this thesis is that while the roles and responsibilities of external accountability agencies under whistleblower protection legislation provide an important compliance mechanism in accordance with their traditional jurisdictions, their roles in encouraging whistleblowers to make disclosures and improving ethical cultures within departments is much more constrained. While the limitations of legislative thresholds and resource constraints on accountability agencies are acknowledged, the experience of whistleblowers indicates that these agencies have taken a very narrow view of their roles and thereby fail to fully institutionalise the aims of whistleblower protection legislation.

The following sections deal with the three States in chronological order, based on the dates of assent to the whistleblower legislation. In each case, the background against which whistleblower legislation was developed is identified, the debates during the

passage of the legislation through parliament are analysed, and the final form of the various Acts is analysed to establish how they reflect the political contexts in which they were developed.

## Queensland - Whistleblowers Protection Act 1994

### Background to development of whistleblower protection

In July 1989, Tony Fitzgerald QC handed to the Queensland Government the report of the '*Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct'* (the 'Fitzgerald Report'). The commission had sat for two years and had its terms of reference expanded twice. According to the Crime and Misconduct Commission's (CMC) summary of the inquiry, by the time of its completion Fitzgerald had '*set a new standard for commissions of inquiry*' (CMC website) examining as it had not only specific allegations and specific people, but exposing a corrosive network of corrupt activity in Queensland which resulted, not least, in the gaoling of a police commissioner and the beginning of the end of thirty years of National Party government in that State.

Fitzgerald's achievements would not have been possible without the granting of indemnity against prosecution to key witnesses. Central to the revelation of corrupt activities was the evidence from both serving and retired police officers. While Fitzgerald did not make formal recommendations about the enactment of legislation or procedures to protect internal witnesses, the section of the report on whistleblowers made it clear that this was his view:

> *Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced…*
>
> *There is an urgent need, however, for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities.* (Fitzgerald Report 1989:s3.5.7)

Fitzgerald was also clear that the recipient(s) of such information would need not only to be independent, but empowered to take appropriate action on a disclosure:

> *It is also necessary to establish a recognised, convenient means by which public officers can disclose matters of concern. What is required is an accessible, independent body to which disclosures can be made, confidentially (at least in the first instance) and in any event free from fear of reprisals.*
>
> *The body must be able to investigate any complaint. Its ability to investigate the disclosures made to it and to protect those who assist it will be vital to the long term flow of information upon which its success will depend.* (Fitzgerald Report 1989:134)

Fitzgerald recommended the establishment of two new bodies: the Electoral and Administrative Review Commission (EARC) and the Criminal Justice Commission (CJC). The incoming Labor government acted quickly to implement these recommendations.

Fitzgerald had made very detailed recommendations about what the EARC was to focus on. One of the tasks of the EARC was the *'preparation of legislation for protecting any person making public statements bona fide about misconduct, inefficiency or other problems within public instrumentalities and providing penalties against knowingly making false public statements'* (Fitzgerald Report 1989:370). Having conducted reviews and arrived at recommendations, the EARC submitted its reports to the then Parliamentary Committee for Electoral and Administrative Review (PCEAR).

The PCEAR reported to the Queensland Parliament in June 1990, recommending interim whistleblower protection measures by way of strengthening protection for people providing information to the EARC and the CJC. These provisions were enacted and the EARC commenced a comprehensive review of whistleblower protection which culminated in a second report to PCEAR with wide-ranging recommendations and a draft *Whistleblowers Protection Bill*.

The thrust of the EARC recommendations was about the need for a scheme which encouraged disclosures to be made internally within departmental structures backed up by an external disclosure mechanism. The EARC also recommended the establishment of a counselling unit within the CJC (PCEAR Report 15,1992:11) and the option of reporting directly to the media in situations where the whistleblower believed there was a '*serious, specific and imminent danger to the health or safety of the public*' (PCEAR

Report 15, 1992:12-15). The EARC also proposed an extension of the scheme to cover private sector employees (PCEAR Report 15, 1992:15).

The CJC rejected a number of the EARC's recommendations. The CJC submitted that the existing legislative protections appeared to it to be adequate, albeit untested, and that the proposed scheme, which provided for disclosures to be made to a 'proper authority' including departments and agencies within which the whistleblower was employed, was a fragmented and confusing scheme (PCEAR Report 15, 1992:8). It noted that the establishment of a whistleblower counselling or advisory unit within the CJC would have resource implications for that agency and rejected the media reporting option outright.

Having canvassed the various objections to the EARC recommendations, the PCEAR reported again to the Parliament in April 1992, unanimously endorsing the EARC's recommendations and a draft bill, with some few amendments such as renaming the counselling unit an advisory unit and noting that the CJC might not be the most desirable location for such a unit (PCEAR Report 15, 1992: Appendix 8).

The following year, the PCEAR made a report to the Parliament on its review of the EARC's recommendations in relation to codes of conduct for public officials (PCEAR Report 18, 1993). The Chairman's foreword to the PCEAR report referred to Fitzgerald's concern that legislation alone could not prevent misconduct, corruption or inefficiency and that the creation of an ethical climate within the public sector would be fundamental to minimising any recurrence of the conduct he had revealed. While endorsing the EARC's proposals that a public sector ethics model should be based on legislation, cover both appointed and elected officials and that an Office of Public Sector Ethics should be established, the PCEAR did modify the proposed scheme. It viewed the scheme proposed by the EARC as unnecessarily complex and inflexible and proposed that a two tier scheme be established, comprising:

1. a code of ethics setting out ethical obligations for appointed and elected public officials, enshrined in legislation
2. agency-specific codes of conduct whereby each unit of the public sector prepares a code applicable to all officials of the unit and consistent with the ethical obligations endorsed by the PCEAR (PCEAR Report 18, 1993:24).

The PCEAR report clarified that the primary objective of public sector ethics legislation was to '*declare rather than impose standards of acceptable official conduct on public officials'*. Disciplinary action could, however, follow proven breaches of agency specific codes of conduct (PCEAR Report 18, 1993:ii).

Bills proposing the code of ethics for elected and appointed officials and a whistleblower protection scheme were not introduced into the Parliament until the following year, 1994. This was the second term of the Goss Government and it held a 19 seat majority in the unicameral Queensland Parliament. It is unsurprising, therefore, that the Government was able to over-ride any of the Opposition's objections or proposed amendments to its legislative proposals.

## Parliamentary debate

Premier Wayne Goss presented a package to the Parliament – a Public Sector Ethics Bill and the Whistleblowers Protection Bill – calling it '*part of the comprehensive and ongoing program of reform in Queensland which has made this State respectable again'* (Goss, Hansard, 19/10/1994:9685-9697). In his speech, the Premier identified as the main objective of the Public Sector Ethics Bill:

> *...to declare the fundamental ethical obligations of public officials as the basis of good public administration, and to provide for agency-based codes of conduct, effective implementation, including training in the implementation of such codes, and relation administrative mechanisms, including sanctions for breaches of codes.* (Goss, Hansard, 19/10/94:9686)

Each department was charged with developing its own code, based on the principles in the Bill and in consultation with staff. The aim was for maximum 'ownership' and understanding of the ethical requirements for being a public official. The Bill was to complement the proposed whistleblower protection legislation by obliging public officials to expose fraud, corruption and maladministration and for departmental codes to enable employees to challenge directions that were considered to be improper or unlawful.

The Premier was explicit about the relationship between the *Public Sector Ethics Bill* and the *Whistleblower Protection Bill*:

> *Both aim to create a work environment in which defined standards of ethical conduct are widely understood and observed, and staff are encouraged to report serious wrongdoing using approved internal and external channels. Both encourage chief executives to take responsibility for ethics training and case management rather than relying on the CJC, or doing nothing, and both Bills provide for an advice function to assist CEOs and employees on public sector ethics matters.*
> *The Public Sector Ethics Act will complement the proposed Whistleblowers Protection Act by placing an obligation on public officials to expose fraud, corruption and maladministration of which they are aware. Agency codes will also enable chief executives to provide procedures to allow employees to challenge directions that are considered to be improper or unlawful.* (Goss, Hansard, 19/10/1994:9689)

In the Second Reading of the *Whistleblowers Protection Bill*, the Premier referred to interim safeguards introduced in 1990 which increased the protections for persons assisting the Criminal Justice Commission (CJC) and other independent review bodies. The proposed Bill set out a more comprehensive scheme for whistleblower protection and extended both the kinds of misconduct about which disclosures would be made and the protections available for persons making those disclosures.

The Premier identified a key feature of the Bill as providing protection for public officers who made public interest disclosures to their own department:

> *…if its own conduct is involved, or that of its staff, or to any appropriate public authority which can investigate the wrongdoing… This arrangement gives public officers wide flexibility in determining which agency they can disclose the wrongdoing to.* (Goss, Hansard, 19/10/1994:9690)

The Bill provided for a wide range of officers within a department to receive such disclosures. The protection of internal disclosures was a new step and, as noted earlier, was a provision opposed by the CJC. Its adoption is however consistent with the principle of 'distributed integrity' and the importance of departments taking primary responsibility for high standards of conduct and ethical organisational culture.

Disclosures by public officers could be made about:

- official misconduct, as defined in the Criminal Justice Act and including fraud, corruption and misappropriation

- maladministration
- negligent or improper management resulting in substantial waste of public funds
- conduct causing a substantial and specific danger to public health or safety or to the environment. (*Whistleblowers Protection Act* sections 15-20).

Although principally aimed at protection of public sector whistleblowers, the Bill broadened the definition of whistleblower in Queensland by proposing the protection of anyone disclosing a substantial and specific danger to the health or safety of a person with a disability or to the environment, or abuses by health services providers, particularly in the area of mental health care. These are integrity breaches potentially requiring urgent rectification and the purpose of including them in the whistleblower protection scheme was to encourage swift reporting.

While the Leader of the Opposition, Rob Borbidge, confirmed support for the Bill, the support was grudging, *'... only time will prove if this Bill is better than nothing'* (Borbidge, Hansard, 17/11/94:10477) and later, *'... the Opposition supports the Bill simply because it is better than nothing'* (Borbidge, Hansard, 17/11/94:10482). Another Opposition member's criticism of the proposed legislation was that its effect would be to constrain whistleblowers to reporting within a public service structure that did not serve increased accountability or ethics:

> *This Bill is the ultimate expression of that suppression of any dissent that might come from those in a position to spot Labor's plunder of this State.* (Grice, Hansard, 17/11/94:10486)

Much of the debate about the external reporting options concerned the role and reputation of the CJC.

A large part of the Premier's Second Reading Speech included the tabling of a letter he had written in response to the Chair of the Commonwealth Senate Select Committee on Public Interest Whistleblowing. The Chair, Senator Jocelyn Newman, had proposed that a number of outstanding Queensland whistleblower matters be independently investigated. The Premier rejected this proposal and used the opportunity to reiterate the main features of the Bill under consideration and, in particular, the role of the CJC in relation to public interest disclosures. The CJC had apparently warranted special mention in the Senate Select Committee's report because it had been heavily criticised

by the Queensland Whistleblowers Action Group and in a study of Queensland whistleblowers by William De Maria (De Maria 1994, De Maria and Jan 1994, De Maria and Jan 1995). Premier Goss referred not only to the substantial resourcing of the CJC, but its '*extraordinary legal powers to uncover misconduct*' and its range of mechanisms to protect and support whistleblowers, including a recently established Whistleblowers Support program:

> *Most importantly, the CJC has complete autonomy in conducting its investigations and is required by its Act to act independently and impartially at all times… If a whistleblower is dissatisfied with an investigation by the CJC, it is open to them to take the matter up with the [Public Sector Management] Commission or with the Parliamentary Criminal Justice Committee which, on behalf of the Parliament, oversees the operation and performance of the CJC…*
>
> *I also reject the proposition that the CJC is not an appropriate body to investigate complaints by whistleblowers because the CJC may also be required to investigate misconduct by whistleblowers themselves as public officer.* (Goss, Hansard, 17/11/94:9695-6)

The Opposition was in fact concerned about how a whistleblower support unit could be placed in the CJC precisely because its other role might include investigation of those same people (Beanland, Hansard, 17/11/94:10498). The Opposition flagged an amendment at the committee stage to place such a unit in the Parliamentary Commissioner's office. This was defeated by the Government majority.

The CJC was to have an enhanced role under the *Whistleblowers Protection Bill*, being charged with investigating alleged reprisals taken against public officers for making disclosures to their own department as well as to external agencies including the CJC (Goss, Hansard, 17/11/94:9697). Additional protections to be provided by external agencies included the option for an employee to appeal to the Commissioner for Public Sector Equity for relocation to another department if risk to the employee was ongoing.

Although some criticism of the CJC was that it had become politicised through the Government's misuse of it, the main thrust of the argument was based on the research that was being conducted in Queensland about the fate of whistleblowers, including those that had dealt with the CJC: '*whistleblowers gave the CJC the thumbs down across the board'* (Grice, Hansard, 17/11/94:10480). De Maria and Jan's research and

reference to it in a *Courier Mail* editorial was extensively cited by the Opposition during this debate. The Opposition referred to findings that whistleblowers were cynical about the credibility, independence and impartiality of the CJC and, while the Parliamentary Commissioner for Administrative Investigations (the Queensland Ombudsman) was to be preferred to the CJC, whistleblowers would be more confident with the establishment of a new independent whistleblower agency (Borbidge, Hansard, 17/11/94:10479; Santoro, Hansard, 17/11/94:10492; Beanland, Hansard, 17/11/94:10498).

The Premier dismissed the call by '*some Queensland so-called whistleblowers'* for a new body to investigate whistleblower complaints on the grounds that existing independent accountability agencies already existed with wide powers to take action on disclosures received and that the ethics unit of the Public Sector Management Commission would be able to support whistleblowers (Goss, Hansard, 17/11/94:10514).

Government members also defended the CJC, noting that while it might sometimes get something wrong it was:

> *...an independent commission that reports directly to Parliament through a parliamentary committee' and that 'genuine whistleblowers who have been seriously disadvantaged by the system' should approach the parliamentary committee on the CJC.* (Barton, Hansard, 17/11/94:10484-5)

Barton, a Government backbencher, went on to suggest that some whistleblowers were not happy with the CJC because they did not get the result they wanted, but that this might be due to insufficient evidence or the reporting of trivial matters that the CJC had rejected. The Government also stressed that reporting to the CJC was but one option in the Bill:

> *The Bill gives a public officer the legal right to make a public interest disclosure to any public sector entity that is an appropriate entity to receive the disclosure.* (Beattie, Hansard, 17/11/94:10499-104500)

Unconvinced, the Opposition proposed an amendment in committee that would allow whistleblowers whose disclosure should properly be made to the CJC, but who did not want to approach the CJC, to go to the Parliamentary Commissioner instead. The Premier spoke at length against the amendment noting in particular the difference in

jurisdiction and role between the two agencies but also referring to '*a pathological opposition to the Criminal Justice Commission*' on the part of the Opposition that amounted to *'an orchestrated campaign ... to lead to the undermining and eventual abolition of the Criminal Justice Commission'* (Goss, Hansard, 17/11/94:10517). The amendment was defeated by the Government majority.

The CJC was eventually abolished in 2002 when it and the Queensland Crime Commission were amalgamated into the Crime and Misconduct Commission (CMC). Further references in this thesis are to the CMC.

Despite the recommendations of the PCEAR, the Bill did not propose protection of persons who make disclosures to or through the media. Continuing its argument that restricting whistleblowing to within the bureaucracy would not serve the purpose of increased accountability, the Opposition criticised the Government's decision not to provide specific protection for whistleblowers who, having failed to achieve satisfaction either within the department or via an external accountability agency, approached the media as a last resort:

> *This Bill is fundamentally flawed because it does not give protection for an officer who has made the disclosures, argued his case through the appropriate channels and got nowhere...* (Borbidge, Hansard, 17/11/08:10479)

The Leader of the Opposition, echoing sentiments expressed by NSW MP John Hatton just two days before (see below), stated:

> *This legislation will make sure that if the whistles ever do get into the mouths, they will be blown very softly and not in the public arena.* (Borbidge, Hansard, 17/11/08:10482)

The *Courier Mail* editorial (see above) referred to by Opposition members was, no doubt self-servingly, emphatic on the need for disclosures to the media:

> *The proposition that whistleblowers should only blow their whistle in the close confines of the State Government's hearing is, commonly, frankly offensive. It is a mechanism designed to control what is allowed to become public knowledge...* (cited by Borbidge, Hansard 17/11/94:1049)

The Government defended its decision not to provide specific protection for whistleblowers who reported to the media on the grounds that, unlike during the time of

the Fitzgerald Inquiry, the Government was providing workable alternatives to disclosures to the media:

> *If the process works, there will be no need for the media to be included in the equation… I am confident that all genuine whistleblowers will have an appropriate body to go to. Most will have a number of options.* (Barton, Hansard, 17/11/94:10485)

The Government was at pains to emphasise that the Bill did not prohibit disclosures to the media, it simply did not provide the additional protections that would attach to public interest disclosures made to an appropriate entity. It based its argument on two grounds. First it argued that this was only proper because of the need to protect the reputations of the innocent against false allegations that were publicised without proper investigation:

> *This legislation seeks to strike a balance to protect the genuine whistleblower and encourage evidence and complaints of wrongdoing, criminal and official misconduct to be brought forward, but not at the expense of giving an absolute blank cheque to malicious muckrakers to defame with impunity the reputation of innocent citizens.* (Goss, Hansard, 17/11/94:10513)

The second argument was that it was important to ensure that disclosures would be directed to agencies with the proper authority to investigate the allegations (Goss, Hansard, 19/10/1994:9691). In fact, despite Fitzgerald's clarity on this point, the Bill did not include any requirement for authorities receiving disclosures to investigate them. The amendment in committee to include protection for disclosures to the media was defeated by the Government majority.

The only provisions for public reporting on the implementation of the legislation and its contribution to improving ethical standards in departments was a requirement that departments and accountability agencies would report in their annual reports to Parliament on '*the number of disclosures received and whether they have been substantiated*' (Goss, Hansard, 17/11/94:9691). As will become evident from the next Chapter, this minimal requirement provides very little information on which to base any assessment of the achievements of agencies in protecting whistleblowers or contributing to the improvement of ethical conduct in the public sector.

The *Whistleblowers Protection Act 1994* was assented to on 1 December and commenced on 16 December 1994.

## Provisions of the legislation

The following paragraphs set out the purpose of the Act, the sections that describe the reporting options available to whistleblowers and any other sections that prescribe other functions to be carried out by external accountability agencies.

Section 7 details the general nature of the Act's scheme:

> *(1) This Act provides a scheme that, in the public interest, gives special protection to disclosures about unlawful, negligent or improper public service conduct or danger to public health or safety or the environment.*
> *(2) Because the protection is very broad, the scheme has a number of balancing mechanisms intended to –*
> *(a) focus the protection where it is needed; and*
> *(b) make it easier to decide whether the special protection applies to a disclosure; and*
> *(c) ensure appropriate consideration is also given to the interests of persons against whom disclosures are made; and*
> *(d) encourage the making of disclosures in a way that helps to remedy the matter disclosed; and*
> *(e) prevent the scheme adversely affecting the independence of the judiciary and the commercial operations of GOCs [government owned corporations] or corporatised corporations.*

Public interest disclosures under the Act must be made to 'an appropriate entity'. Appropriate entity is described very broadly in s26(1) of the Act:

> *Any public sector entity is an appropriate entity to receive a public interest disclosure-*
> *(a) about its own conduct or the conduct of any of its officers; or*
> *(b) made to it about anything it has a power to investigate or remedy; or*
> *(c) made to it by anybody who is entitled to make the public interest disclosure and honestly believes it is an appropriate entity to receive the disclosure under paragraph (a) or (b); or*
> *(d) referred to it by another public service entity under section 28.*

This section enables not only public sector departments, but external accountability agencies to receive and investigate disclosures within their jurisdiction. The Act does

not identify specific external or oversight entities to which disclosures must be made. Instead, s2(i) refers to *'a commission, authority, office, corporation or instrumentality established under an Act or under State or location government authorisation for a public, State or local government purpose'*. Section 26(1)(d) enables the referral of disclosures between agencies, e.g. from an external accountability agency back to the department the subject of the disclosure.

If any appropriate agency, including accountability agencies, '*establishes a reasonable procedure for making a public interest disclosure to the entity, the procedure must be used by a person making a public interest disclosure to the entity*' (s27(2)).

Section 30 provides that any public sector department which is required to prepare an annual report to the Parliament must include in that report statistical information on the number of disclosures received or referred to it and the number of those disclosures 'substantially verified' in the reporting period.

Section 32 requires the recipient of a disclosure to provide the whistleblower, or a referring entity, with '*reasonable information about action taken on the disclosure and the results*'. Subsection 32(a) limits the requirement in relation to CMC by not imposing any duty on the commission that it does not already have under its own legislation. This provision ensures that the CMC is not required to provide more information than it usually would and thereby protects the confidentiality of ongoing investigation.

The CMC is also charged with investigating alleged reprisals (s57) and has the power to apply for a Supreme Court injunction against reprisal action (s48).

## Analysis

The *Public Sector Ethics Bill* and the *Whistleblowers Protection Bill* were presented to the Queensland Parliament as a package in 1994. The first of these Acts is symbolic, '*stating aspirations and social values*', while the *Whistleblowers Protection Act* provides a '*framework for enforcement*' (Althaus *et al* 2007:94-95) in relation to reporting of serious breaches of ethical codes and standards and other wrongdoing.

Much discretion about action to be taken in response to disclosures is left to the 'appropriate entities' to whom protected disclosures can be made.

The focus of the *Whistleblowers Protection Act* is not, as the name suggests, on the reporter, but on providing special protection for disclosures of wrongdoing (s7(1)). The legislation focuses on what disclosures can be made and how. It is not until Part 5 of the Act that any reference is made to the protection of the person making the disclosure, by way of making it unlawful to take reprisals against a person who has made a disclosure in the public interest and requiring agencies to establish procedures to protect its officers from reprisals. The few statutory requirements for agencies receiving disclosures do not in fact emphasise either the protection of reporters or the investigation of the disclosure, but rather the keeping of proper records (s29(3)) and reporting annually to the parliament on statistical information about disclosures received and substantially verified in the reporting period (s30(1)).

Although Premier Goss referred to the investigation of wrongdoing disclosed by whistleblowers in his Second Reading Speech (Goss, Hansard, 19/10/1994:9690) in terms of the mechanisms of accountability, the Act is limited to 'obtaining information' (Mulgan 2003:29-30). Consistent with its emphasis on 'information', the regime established under the Act is extremely flexible, providing reporting paths to a wide range of agencies and departments. Agencies are required to provide reasonable information to the person disclosing information on what has been done in response to the disclosure, and if that reporter is dissatisfied, they can report to other agencies. In this way the Act attempts to ensure that appropriate action is taken on the matters disclosed, even though there is no requirement for 'appropriate authorities' to investigate disclosures.

External accountability agencies are not given any specific statutory roles in addition to their existing investigative functions, with the exception of the investigation of reprisals by the CMC. Although during the parliamentary debate much criticism was directed to the efficacy and independence of the previous anti-corruption body, the CJC, the Government deemed existing integrity structures provided by departments and external

accountability agencies to be sufficient once the additional protection for the disclosure was provided by the legislation.

The focus of the debate and the final form of the Act are on structures for reporting and mechanisms of accountability. Individuals are barely mentioned, and when they were it was generally in negative terms – public officials who needed to be compelled to report wrongdoing, 'muckrakers' set on ruining an innocent party's reputation, 'so-called whistleblowers' bent on using the media and the Opposition to destroy the CJC. There was no focus on the support and encouragement of the 'honest public officials' Fitzgerald was keen to protect and so the Act provides no mechanisms which are actually designed to encourage whistleblowers to make disclosures beyond criminalising the taking of reprisals against someone who has already made a disclosure. There is an assumed willingness on the part of whistleblowers to report externally if they achieve no resolution by internal means and to trust external accountability agencies to then take appropriate action. Analysis of empirical data later in this thesis indicates the severe limitations of this approach.

There is a further assumption about the capacity of those external accountability agencies to influence organisational cultures within departments by ensuring compliance with standards and codes of conduct. The theoretical difficulties with this assumption have already been canvassed; the empirical analysis that follows serves to confirm the limitations of this approach in practice.

The *NSW Protected Disclosures Act*, debated over a similar time period to its Queensland equivalent and assented to in the same month, demonstrates a similar reliance to the Queensland legislation on existing accountability structures.

## New South Wales – Protected Disclosures Act 1994

### Background to development of whistleblower protection

Premier Nick Greiner was elected in 1998 on a reform platform following a series of corruption issues in New South Wales including the resignation of a disgraced deputy police chief, the successful criminal prosecution of the Chief Stipendiary Magistrate, the

resignation of a Prisons Minister and allegations of corruption against a High Court judge (Tiffen 1999:197). Premier Greiner argued strongly for the need to re-establish the highest standards of integrity and accountability in public administration in NSW. One of his first reform measures was to establish the Independent Commission Against Corruption (ICAC):

> *Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and that community confidence in the integrity of public administration is preserved and justified. This is not just empty rhetoric. We have a program of reforms that we will carry through.* (Greiner, Second Reading Speech for the Independent Commission Against Corruption Bill, Legislative Assembly, 26/05/88:673)

The Greiner Government was re-elected in 1991 but only as a minority. Legislation to protect public sector whistleblowers was one element of the package of reforms agreed between Premier Greiner and three independent members of Parliament (John Hatton, Clover Moore and Dr Peter MacDonald) as a condition of the Independents support of the Government. The stated aim of the Memorandum of Understanding (MOU) that was signed by these parties was '*to provide stable Government for the people of New South Wales and to enhance Parliamentary democracy and open and accountable Government in New South Wales*' (MOU 1991:1). Apart from proposals for parliamentary reform, it proposed measures aimed at 'guaranteeing open and accountable government' including a strengthening of the Freedom of Information Act and measures supporting rights of citizens. The statement of principle specifically supporting whistleblower legislation was based on the right to freedom of speech:

> *The Government recognises the fundamental right of freedom of speech for all public sector employees and will legislate to provide full protection of the rights and employment of any public sector employee who exposes corruption or matters constituting public maladministration or significant waste. Such legislation while providing protection for genuine public interest exposures must not protect exposure of distorted, fabricated or incomplete material.* (MOU 1991:14)

However, while the proposal was initially grounded in the principle of protecting freedom of speech, the focus shifted to emphasise encouraging disclosures in the public

interest about corruption, maladministration and substantial waste of public resources, and freedom of speech was not mentioned again even in debate about the various forms of the legislation.

Unlike Queensland, the Greiner Government did not have a majority in the Legislative Assembly or the Legislative Council and the progress of the legislation was therefore much influenced by the Independent members on whom the Government depended for support.

## Progress through NSW Parliament

The first draft of the *Whistleblowers Protection Bill* was introduced into the Parliament on 30 June 1992. It provided that disclosures could be made by any public sector employee, but only to existing accountability agencies – the Independent Commission Against Corruption, the Ombudsman and the Auditor-General. The then Deputy Premier's Second Reading Speech noted that

> *The right to override confidentiality provisions in making disclosures can be conferred because protected disclosures are made only to specific authorised agencies.* (Murray, Hansard, 30/06/92:4812)

The second reason for limiting disclosures to these accountability agencies was to utilise their existing powers and experience in considering and investigating complaints and allegations. The Bill was not to affect the powers of these agencies since, once a disclosure was made, the handling of it was to become a matter for the agency's discretion. A small amendment was to be made only to the *Public Finance and Audit Act* to enable the Auditor-General to conduct a special audit following a disclosure of substantial waste of public money.

The exposure draft of the Bill was to lie on the table in order that interested parties had an opportunity to comment on it. This version of the Bill was withdrawn in October 1992. The second version of the legislation, which took into account comments and submissions on the exposure draft, was read for a second time on 27 November 1992. In the ensuing debate, Government members emphasised that one of the main features of the Bill was that it did not treat whistleblowing as an end in itself but augmented existing integrity structures:

> *The bill places whistleblowing in the context of the mechanisms and structures already in place in this State to obtain honest and efficient public administration. This is the best method for ensuring that complaints are dealt with appropriately.* (West, Hansard 27/11/92:10481)

> *There are considerable advantages to the approach taken in the bill of augmenting existing structures and mechanisms. Clearly, it is more effective to utilise existing channels and institutions. This approach also ensures that disclosures are directed to authorities that possess the appropriate experience and expertise to consider and investigate complaints and disclosures. The effect of the bill is that where a protected disclosure is made or referred to one of the three investigating authorities - that is the Independent Commission Against Corruption, the Ombudsman or the Auditor-General - that investigating authority is able to exercise its full, investigative and reporting powers in relation to the disclosure.* (West, Hansard, 27/11/92:10482)

In addition to existing structures and mechanisms, however, the Bill included protection for those who chose to make their disclosures within departmental structures:

> *Perhaps the most important change is that the proposed legislation will also protect internal disclosures made to the principal officer of a public authority or made in accordance with the internal procedures established by authorities for the reporting of corrupt conduct, maladministration or substantial waste of public money.* (West, Hansard 27/11/92:10482)

The change of emphasis from relying primarily on external accountability agencies to promote accountable and ethical cultures within departments is, like the Queensland model, reflective of the importance of 'distributed integrity' systems:

> *These new bills will reflect the emphasis being placed by New South Wales government administration on encouraging authorities to have their own mechanisms in place for detecting, dealing with and preventing misconduct. The initial responsibility for combating misconduct should rest with departments and agencies themselves rather than with external investigating authorities. Recognition of internal disclosures in the Whistleblowers Protection Bill will assist in ensuring that departments and agencies are able to meet this responsibility.* (West, Hansard 27/11/92:10482)

As with the Queensland legislation, the Government's intention was to provide flexibility for the prospective whistleblower:

> *I emphasise that the choice of whether to report internally or externally lies with the whistleblower, but the same level of protection will apply to those who disclose misconduct using internal channels as to those who report misconduct to an investigating authority. The Whistleblowers Protection Bill provides a scheme for the protection of whistleblowers that is workable and realistic.* (West, Hansard 27/11/92:10482)

The significance of the legislation to be its contribution to the integrity system in New South Wales:

> *The bill will provide a further method of promoting the high standards of probity and efficiency in the public sector to which this Government is committed. It will assist the Independent Commission Against Corruption, the Ombudsman and the Auditor-General, and government departments and agencies generally, to prevent and combat corrupt conduct, maladministration and a substantial waste of public money.* (West, Hansard, 27/11/92:10482)

Other Government amendments in the second version of the Bill clarified that the subject matter of a disclosure was to fit within the existing responsibilities and jurisdiction of an external accountability agency and strengthened the capacity of these agencies to refer a disclosure to another agency which was authorised to investigate the subject matter of that disclosure. In order to address concerns that the first version did not protect disclosures made to the wrong accountability agency, this Bill made explicit provision for the protection of disclosures referred between agencies (Fahey, Hansard, 17/11/92:9007).

A Government member speaking in support of the Bill argued strongly for ensuring what has been described as a 'virtuous circle' by way of a provision ensuring the proper and independent investigation of disclosures made from within, and about, the accountability agencies themselves: *'it is necessary to consider who watches the watchdogs and who investigates the investigators'* (Page, 27/11/92:10477).

The Independents and the Opposition supported the provisions of the Bill while flagging some additional matters that should be clarified during consideration of the Bill by a legislation committee. The Legislative Assembly agreed the Government's referral of the Bill to a legislation committee would report by 31 March 1993. Clover Moore was the Independent Member on the committee together with three Government

members and two from the Opposition. The Committee received 36 submissions and held public hearings on two days. The Legislation Committee did not in fact report until 30 June 1993, '*due to the numerous problems that arose on the Committee's examination of the Bill*' (Committee Report 1993:s1.1.3). These problems were not identified.

In agreeing to the referral of the Bill to a legislation committee, John Hatton had argued passionately for the establishment of an advocacy or counselling unit within the Ombudsman's office, acknowledging the difficult choices to be made by whistleblowers:

> *There must be a sanctuary, a place where people can go. I am suggesting the Ombudsman, where the whistleblower can go and seek advice, counselling and assistance. The whistleblower is worried about whether he should expose his knowledge and what the result will be. The whistleblower is often in a position of siege and loneliness and should be able to go to the Ombudsman, and on a confidential basis consult someone who will put the whistleblower and the information he wishes to divulge in perspective, in the narrower sense within his own department and in the wider sense be told where the information and disclosure fit into the broader public interest, the impact and importance of the information sought to be disclosed, the accuracy and relevance of the disclosure, and the workplace relationship. They should be able to discuss the pressures that might be placed on them by their peers and superiors, the effect it will have on the authority, what to do with the information, whether to take it straight to the ICAC or leave it with the Ombudsman, or take it to the Director of Public Prosecutions, or to the police or do something else with it.*
>
> *This important measure will provide a sanctuary for people who believe in all sincerity that their information is of great importance and, in many cases, discourage those with vexatious material. It enables them to put the whole of that into perspective, which is an important first step.* (Hatton, Hansard, 27/11/92:10481)

The Committee considered the need for an advisory unit and the creation of a new body to coordinate whistleblower disclosures but decided that this would not be necessary to achieve the objectives of the Bill. The Committee concluded that the Bill '*established a system of protection for whistleblowers not new avenues of disclosure or investigation to cater for whistleblowers' 'special needs'* (Committee Report 1993: s2.1.8). The Committee noted that the policy underlying the Bill was to utilise existing

accountability structures, principally the ICAC, the NSW Ombudsman and the Auditor General, and commented that '*to date there has been no reason to have but full confidence in the effectiveness of these bodies*' (Committee Report1993:s2.1.12). The Committee did, however, recommend that the three accountability agencies set up a 'whistleblowers panel' to avoid duplication of actions, ensure the efficient and economical use of resources and to ensure the most effective result was obtained from disclosures (Committee Report 1993: Recommendation 1).

The only change to the jurisdiction of these agencies was that Committee recommended an amendment to the *Ombudsman Act 1974* to ensure that complaints about reprisal action could be investigated following the making of a protected disclosure and would not be excluded on the ground of being employment-related (Committee Report 1993: Recommendation 15).

The Committee also recommended an amendment to the Bill to prescribe that all public authorities establish appropriate internal procedures for dealing with protected disclosures and that each accountability agency should develop guidelines to assist public authorities in establishing proper internal procedures. (Committee Report 1993: Recommendation 2). A further recommendation was that all public authorities should publish in their annual reports the complete details of internal procedures (Committee Report 1993: Recommendation 8). Neither provision was included in the final form of the legislation although the NSW Ombudsman has published extensive guidelines on managing whistleblowing (NSW Ombudsman 2004[a]).

The Committee gave considerable attention to the need to develop appropriate external reporting paths for whistleblowers from within the accountability agencies:

> *Each of the investigating authorities should operate as models for all public authorities within the area in which they are concerned. The public interest would not be served if the three investigating authorities were somehow exempt from the development of an external channel of disclosure. Without this channel each of the bodies would be less accountable. This can not be in the public interest.* (Committee Report 1993:s2.3.5)

The recommendation was that such disclosures should be made to the relevant parliamentary committee oversighting the agency in question. That parliamentary

committee would have final responsibility for deciding how the disclosure should be handled.

The question of whether public reports to the media should be protected was described by the Committee as one of the most difficult issues it confronted (Committee Report 1993:s2.4.1) The Committee was split on its decision with a recommendation by the majority of Committee members that no such avenue be allowed, and a minority dissenting opinion. The issues raised are of relevance to this thesis because the need for protection of disclosures to the media as a last resort turned on the question of the success of the roles of accountability agencies. ICAC's evidence to the Committee included an admission:

> *Nevertheless, institutions may fail. A safety-valve may be necessary where inaction or victimisation occurs. However, public disclosure should be a last resort and the circumstances in which the public disclosure is protected should reflect this.* (Committee Report 1993:s2.4.4)

The whistleblower support group, Whistleblowers Australia, supported this view in its submission to the Committee:

> *The only protection that whistleblowers have had in recent years has been to turn to the media and depending on public outcry to keep themselves from prosecution or retaliatory discharge…*
>
> *Once a whistleblower makes his or her disclosure, the information is no longer under their control leaving them no assurance that the matter will be investigated. It would appear to be inappropriate to rule out an approach to the media.* (Committee Report 1993:s2.4.14)

The majority view of the Committee was that the reasons given for protecting even a last resort disclosure to the media had been obviated by the protections included in the Bill. In addition, the Committee confirmed its faith in the effectiveness of the accountability agencies:

> *The Committee was not presented with argument that the investigating authorities are ill-equipped or in some way incapable of dealing with the matters raised by whistleblowers… It is important to note that whistleblowers are not making disclosures which each of the investigating authorities are not used to nor experienced in investigating. The Committee can, therefore, have nothing but faith in the ICAC, the Ombudsman and the Auditor-General to properly and*

> *competently investigate disclosures made by whistleblowers.* (Committee Report 1993:2.4.18)

The dissenting minority (two members of the Government and Independent member Clover Moore) proposed protection of disclosures to the media as a last resort and with certain conditions because, as the ICAC had acknowledged, institutional failure could occur, and in such circumstances there would be no other effective means of ensuring the allegation was investigated.

The Committee also considered annual reporting obligations, with reference being made to the similar requirement in the Queensland Whistleblower Protection Bill. Oddly, the Committee decided that although detailed information on the operation of the legislation should be collected, it should not be published in annual reports because '*these statistics may be used by a few opportunistic individuals for their own self-interest*' (Committee Report 1993: s2.8.4). No explanation of such misuse was presented but the Committee recommended that annual statistics should only be forwarded to the Joint Parliamentary Committee charged with reviewing the Act.

The Committee discussed changing the name of the Bill, noting that the term whistleblower was not well understood by members of the public and that the Bill did more than simply protect whistleblowers:

> *Protecting persons who make disclosures in accordance with the Bill is but one of the three mechanisms that the Bill uses to achieve its overall objective of encouraging and facilitating the disclosure, in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector. The Bill also seeks to enhance and augment established procedures for making disclosures and providing for those disclosures to be properly investigated and dealt with.* (Committee Report 1993:s2.9.3)

Some nine months after the Committee published its report, Premier Fahey gave Notice of a Motion to bring the renamed *Protected Disclosures Bill* into the House on 21 April 1994. However, the Bill was not read for the second time or debated until 15 November 1994.

During the debate on the Bill the Government emphasised the findings of the Legislation Committee, the majority of which had been incorporated into the new Bill.

In particular, the Government emphasised the protection of whistleblowers as an addition to existing mechanisms of accountability:

> *Whistleblowing was not considered to be an end in itself; rather protection of this kind necessarily required incorporation into the existing structures and operations of the named investigating authorities.* (Page, 15/11/94:5013-5015)

Emphasis was also placed on the importance of departments and the institutionalisation of 'distributed integrity':

> *The bill does not, however, rely solely upon external mechanisms of disclosure for whistleblowers, which was the situation with an earlier draft of the bill… amendments were made to incorporate provisions for internal disclosures within a public authority as well as disclosures to the investigating authorities…*
>
> *The ICAC concluded that a wrong message would be sent to management and staff of public authorities as to their responsibilities for detecting and dealing with corruption, maladministration and substantial waste if only disclosures to external investigating authorities were protected… The principal concern was to incorporate disclosures by whistleblowers into the management and ethical practices of public authorities.* (Page, 15/11/94:5013-5015)

Mr Page, who had chaired the Legislative Committee, asserted in this same speech that the Bill went '*beyond mere public administration to the heart of open government'*. (Page, 15/11/94:5015). Open government did not include, however, protection of disclosures to the media.

The Opposition and the Independents foreshadowed an amendment to enable protected disclosures to be made to the media as a last resort. The Government continued to argue that disclosures to the media were not an accountability measure and protection of such disclosures would afford greater rights to whistleblowers than to the persons named by them. They suggested that media disclosures could be used to maliciously seek to destroy reputations:

> *…an incorrect disclosure made to the media and then published could do irreparable harm to a person's career or reputation or to the integrity of a public authority.* (Whelan P, Hansard, 15/11/1994:5015)

The Government argued that interest groups would also manipulate the system to attack government policy. Independent MP John Hatton's strenuous response was that

'*openness in government [was] the most important thing'* (Hatton, Hansard, 15/11/94:5020) and that the Government's opposition to public disclosures to the media, and to members of Parliament, amounted to the government wanting '*a whistleblower to blow a whistle in a soundproof room*' (Hatton, Hansard, 15/11/94:5040). Mr Hatton moved the amendment in committee and the Opposition voted with the Independents, without whose support the Government was defeated.

Debate in the Legislative Council commenced on 23 November 1994. The Government continued its opposition to the amendments made in the Legislative Assembly enabling disclosures to the media and MPs and indicated that it would seek to have them deleted. The Opposition continued to argue for this last resort reporting option. The Hon Elisabeth Kirkby for the Democrats argued for disclosure to MPs but against reporting to the media. In support of her argument for disclosure as a last resort to MPs, she noted that constituents had complained to her about delay and inaction by investigation agencies, particularly the Ombudsman. However, she did not believe that disclosures to the media would necessarily result in proper investigation. In defending its position, the Government argued that the Bill itself required investigating agencies to act on protected disclosures in a timely fashion and to report back regularly to those making the disclosures.

The Legislative Council in committee agreed to amend the Bill by removing the clauses about protecting reporting to the media and MPs. When the Bill was returned to the Legislative Assembly, it disagreed and requested the Legislative Council not to insist on its amendments. The Council agreed not to insist and the Bill was finally assented to on 12 December 1994 and commenced on 1 March 1995.

Later amendments following the establishment of the Police Integrity Commission (PIC) and the PIC Inspector, prescribed each as an 'investigating authority' in relation to disclosures about police officers and a clarification that the provisions of the Act applied to police officers even though their disclosure of corrupt conduct or other wrongdoing by their fellow officers was not voluntary in the way set out in the existing legislation but a sworn duty. Equally, the Director General of the Department of Local Government was made an investigating authority for the purpose of receiving

disclosures about serious and substantial waste in local government in recognition that the Auditor General in NSW does not have jurisdiction over local government.

## Provisions of the legislation

The object of the Protected Disclosures Act is:

> *To encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:*
>
> *(a) enhancing and augmenting established procedures for making disclosures concerning such matters, and*
>
> *(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and*
>
> *(c) providing for those disclosures to be properly investigated and dealt with.*

The primary importance of disclosures to external accountability agencies evident in the debate on the Bill is reflected in the s8 of the Act where such agencies are the first listed reporting option, followed by internal reporting paths. The relevant jurisdiction and requirements for reporting to each of the ICAC, the Ombudsman, the Auditor General, the PIC or PIC Inspector, and the Director General of the Department of Local Government are set out in sections 10-12B of the Act but, in summary, require reports to be within the existing jurisdiction of those agencies. The definitions of wrong conduct warranting protection under the Act rely primarily on definitions already used by each of those external agencies; that is 'maladministration' is based on the definition in the *Ombudsman Act 1974*, 'corrupt conduct' in the *Independent Commission Against Corruption Act 1988*. 'Serious and substantial waste' is not defined allowing the Auditor General to determine what conduct would fall in to this category. These provisions confirm the Parliament's confidence in the existing capacity of these agencies to fulfil the aims of the legislation.

The provisions providing protection for whistleblowers from within an accountability agency are set out in s12C. Although the initial proposal had been for parliamentary committees to receive and determine the action to be taken in such circumstances, the provisions of the Act were for a cross investigatory capacity, a virtuous circle such as

envisaged by Pope. The provisions extend the jurisdiction of the agencies in the following ways: the Ombudsman is empowered to investigate allegations of corrupt conduct within the ICAC and allegations of serious waste by the Auditor General; the ICAC is empowered to investigate allegations of maladministration within the Ombudsman's office.

Section 19 of the NSW *Protected Disclosures Act* sets out the stringent requirements for the protection of disclosures to the media and MPs, as a very last resort. The public official must have made substantially the same disclosure to an investigating agency or public official, in accordance with the provisions of the Act, and that investigating agency or public official must have decided not to investigate, or not completed the investigation within six months, not made any recommendations as a result of the investigation or have failed to notify the public report of action taken again within six months. In addition to the public official having reasonable grounds for believing the disclosure to be substantially true, the disclosure had to be substantially true – a higher standard of proof than the 'show or tend to show' which applied to other disclosures.

There are a range of other provisions covering matters such as confidentiality and referral between agencies, with the Act expressly providing protection for disclosures referred from one accountability agency to another, or from a principal officer of a department to an accountability agency. There is also a requirement that the operation of the legislation be reviewed regularly (s32) but there are no requirements for public reporting about the operation of the Act even in public authorities' annual reports.

## Analysis

The provisions of the NSW *Protected Disclosures Act* are evidence of the legislators' determination not to consider whistleblowing as anything other than an additional accountability mechanism. As in Queensland, the law relied on existing structures and an assumption that whistleblowers would simply avail themselves of the range of options open to them. Only Independent MP John Hatton revealed any understanding of the particular issues facing whistleblowers. His recommendation for a specialist advisory unit was not supported by the Legislation Committee, of which he was not a member, and was therefore not included in the Bill finally presented to the Parliament.

As in Queensland, the protection of reports within departments was a new step. The protection of internal disclosures was not a reflection of whistleblowers' strong inclination to report within their own departments but did, however, focus attention on the importance of departments being primarily responsible for their own ethical and accountable cultures.

Again like the Queensland legislation, the final form of the NSW Act reflected the Government's confidence in existing accountability structures and an assumption that whistleblowers would similarly trust these agencies and find them trustworthy. Unlike Queensland, there was no specific criticism of an identified accountability agency.

The NSW Act includes no provisions requiring investigation of protected disclosures, simply the requirement to notify the whistleblower of the action '*taken or proposed to be taken in respect of the disclosure*' within six months of its receipt. This is again similar to the Queensland Act and is a further indication that the existing procedures of accountability agencies were considered sufficient to deal appropriately with disclosures made under the Act.

New South Wales was, at the time, the only jurisdiction in Australia where public disclosures to the media and MPs were protected. The Government was unable to resist this inclusion because of its minority status and the commitment of the Independent Members, particularly John Hatton, on whom it relied for support. A much later amendment in May 2007 to the Queensland *Whistleblowers Protection Act* provides for disclosures to be made to individual members of parliament and parliamentary committees, including the Parliamentary Crime and Misconduct Committee. The amendment followed inquiries and two reports into whistleblowers in the Queensland public health sector, and the death of a number of patients at the hands of Dr Jayant Patel.

The requirements for reporting on the operation of the NSW Act are minimal, reflecting perhaps the Legislative Committee's concern about misuse of such information, should it be made publicly available. Not even the minimal statistical reporting required in Queensland was prescribed. As will be seen from the following section, only in Western

Australia was a central monitoring and coordinating function and detailed public reporting part of the statutory framework for whistleblower protection.

## Western Australia - Public Interest Disclosure Act 2003

### Development of the legislation

The development of legislation to protect whistleblowers in Western Australia was a long process which began with recommendations arising from the '*Royal Commission into the Commercial Activities of Government and Other Matters*', what became known as the '*WA Inc Royal Commission'*. One commentator described WA Inc in the following terms:

> *The abuses of WA Inc arose out of a very specific conjunction of political leaders and corporate cowboys, but in a larger sense they dealt with the perennial and central themes of political donations and government patronage, issues which are more resistant to thorough-going reform.* (Tiffen 1999:110)

Two former premiers were among those who were subsequently convicted of criminal offences (Tiffen 199:95). When it reported in November 1992, the WA Inc Royal Commission recommended that the government establish a Commission on Government to '*to conduct inquiries into the matters we have identified and to report its recommendations for change to Parliament. The conduct of this process of inquiry should involve extensive public consultation'* (WA Inc Royal Commission 1992:s7.2.1). The Commission emphasised five 'general issues' that the Commission on Government should inquire into: (1) Open Government; (2) Accountability; (3) Integrity in Government; (4) Ethical Supervision of the Public Sector (including whistleblower protection legislation); (5) Government in Commerce (WA Inc Royal Commission 1992: Appendix 1).

The Western Australian Commission on Government (COG) completed a series of reports covering a wide range of government activities. As was reported in '*The Whistle*', the official newsletter of Whistleblowers Australia:

> *These reports are not only of critical importance for debates about governmental reform in WA, but raise issues of broad concern to anyone interested in parliamentary government in Australia. Report*

> *No. 2 part 1 covers whistleblower protection and functions of the Official Corruption Commission.* (‘*The Whistle’*, August 1996)

In relation to whistleblowers, the COG was specifically charged with a review of legislative and other measures to:

a) facilitate the making and the investigation of whistleblower complaints

b) to establish appropriate and effective protections for whistleblowers

c) to accommodate any necessary protection for those against whom allegations are made. (COG Report 2, p128).

The second report of the COG, published in 1995, had a chapter devoted to the topic of ‘*Whistleblowing as a means for the prevention and exposure of improper conduct in Western Australia’* which included some 34 recommendations detailing how such a scheme should be established.

These recommendations were not taken up until the *Public Interest Disclosure Bill* was introduced by the Gallop Labor Government in 2002. Premier Gallop had won government in February 2001, declaring an intention to aim for high standards of openness and accountability, more integrity in public life and enhanced democracy. In doing so, he referred to the failure of the previous Government, which had established COG, to respond in any meaningful way to many of the commission’s 263 recommendations.

The Gallop Government, unlike the Greiner/Fahey Government in New South Wales held a majority of seats in the Legislative Assembly. Unlike the Goss Government in Queensland which had no upper house to contend with, the legislation had to pass through the Legislative Council where the Government did not have a majority. The progress of the legislation was nonetheless uncomplicated.

## Parliamentary debate

In his second reading speech in May 2002, on the *Public Interest Disclosure Bi*ll, Hon Kim Chance stated:

> *There is nothing more fundamental to ensuring openness and accountability in government than to ensure that people who have the courage to stand up and expose wrongdoing are able to do so without*

> *fear of reprisal. It is totally unacceptable that such people should be maligned or victimised as a result of their efforts to report – and therefore stop – improper or illegal behaviour in government instrumentalities. This Bill will ensure that it cannot happen again. This Government stands for openness and accountability of the public sector. Currently, there is no comprehensive Western Australian legislation that enables a whistleblower to make an allegation of wrongdoing without fear of reprisal. This Bill implements an important government policy commitment.* (Chance, Hansard, 14/05/02:10271)

The ensuing debate on the Bill reflected many of the issues considered by the COG nearly a decade earlier.

Although the COG gave much consideration to who should be considered a whistleblower, and whether that name was in fact appropriate, this was not the focus in the debate about the legislation itself. The title of the legislation, *Public Interest Disclosure Act* followed the recommendation of the COG. The object of the Act is '*to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures'*. The emphasis of the Bill and the debate on its proper form was two-fold: ensuring disclosures would be properly dealt with and investigated, and improving the ethical culture of the public sector. There is no statutory limitation on who is able to make a protected disclosure in Western Australia, only on who such a disclosure can be made to: '*any person may make an appropriate disclosure of public interest information to a proper authority*' (s.5(3)).

The Hon Kim Chance noted that the *Western Australian Anti-Corruption Commission Act 1998* and the *Western Australian Parliamentary Commissioner Act 1971* both offered some protection to whistleblowers making disclosures to those two agencies and advised that the Bill under consideration was intended to complement and supplement these Acts. One of the main arguments for the Bill was that it provided a range of reporting options for whistleblowers. As in New South Wales, there was no debate about the appropriateness of protecting disclosures to existing investigation agencies; the important additional provision was to encourage whistleblowers to report to a 'proper authority' with responsibility for that matter, including the agency or department the subject of the disclosure, thereby providing an opportunity for such

agencies to take responsibility - and appropriate remedial action - on their own initiative. This was in line with COG recommendations, which had had considerable focus on the need for agencies to develop adequate internal reporting procedures to facilitate public interest disclosures.

The need for additional mechanisms should that department or agency fail to take appropriate action was agreed by all participants in the debate: '*This is particularly important when the whistleblower believes that the responsible agency will not or has not properly investigated the matter*' (Chance 14/05/02:10271). A member of the Opposition noted:

> *If a complaint is made to a public authority, a department or an agency other than one of the independent agencies, there is always the opportunity to take that matter further to one of the independent agencies. As such, a review process is essentially being put in place.* (Edwardes, 08/05/02:10068)

The COG recommendation for the establishment of a separate and independent 'Commission for the Investigation, Exposure and Prevention of Improper Conduct' which would have enabled centralised receipt and response to whistleblower complaints was not taken up. The Government's view was that improved protections for whistleblowers approaching existing agencies were sufficient. Although the Opposition did not argue against this proposition, Ms Edwardes, a Shadow Minister, did note that a complaint about one of the investigation agencies was not subject to review unless the complaint fell within the powers of one of the other independent agencies or was brought to the Parliament (Edwardes, WA Legislative Council 08/05/02:10068). The Opposition did not propose more stringent procedures for dealing with such situation. The point was, however, taken up by a member of the One Nation party, who argued for the establishment of a separate body:

> *While watchdog agencies currently exist to investigate whistleblower allegations, they have proved themselves to be thoroughly inadequate*[4]. *They are not set up to investigate the type of allegations that are most*

[4] The references made during debate were to the forced resignation of the State Ombudsman in 2001, just prior to the introduction of the Bill into Parliament, following allegations of significant financial mismanagement made by a whistleblower in the Ombudsman's office. That whistleblower's contract with the Ombudsman's office was not renewed despite the allegations being substantiated.

> *often brought to light by whistleblowers. I believe that an office should be set up specifically for this purpose.* (Fischer, 11/03/03:5046)

The effectiveness of the previous Anti-Corruption Commission (ACC) rather than the Ombudsman had been criticised in the COG. An interim report from the Royal Commission into police conduct in December 2002 found that it was possible '*at an early stage'*:

> *…to conclude that the identifiable flaws in the structure and powers of the ACC have brought about such a lack of public confidence in the current processes for the investigation of corrupt and criminal conduct that the establishment of a new permanent body is necessary.* (Interim Report Police Royal Commission, 2002:3)

In response to this criticism, the Gallop Government moved to establish what it claimed as '*one of the most powerful crime and corruption fighting bodies in Australia*' (McGinty, Hansard, 15/05/03:7861b-7865a/1). Legislation to establish a new independent body passed through Parliament in 2003, the same year as the *Public Interest Disclosures Act* (PID Act). The Opposition used the debate on the Corruption and Crime Commission Bill to emphasise points made about the importance of whistleblowers and a change in public service culture:

> *The Government will not change the public sector culture and create an environment for whistleblowers to come forward on corrupt activity and allegations of serious misconduct, the likes of which the Government wants referred to the Corruption and Crime Commission, if it does not demonstrate that it will protect whistleblowers…. Why would anybody else in the public sector come forward and make complaints which, to all intents and purposes were proven, if they will not be looked after?* (Edwardes, 03/06/03 pp8061b-8071a/1)

This concern about the effectiveness of legislation and of external accountability agencies had been foreshadowed in evidence given to the COG, including by the then Deputy Premier the Hon. Hendy Cowan MLC and the Director of Public Prosecutions, John McKechnie, QC:

> *You can legislate in the same way that there's legislation that says it's unlawful to kill anybody but there were 43 homicides last year in Western Australia. Legislation doesn't prevent crime and legislation won't prevent reprisals to whistleblowers. That is a much more intractable problem which needs to be dealt with by raising ethical standards throughout the public service by developing a culture of openness and communication…* (COG Report 2, p146)

Change in public service culture, and the development of a scheme which encouraged and protected whistleblowers to assist in this change, was very much at the forefront of the debate. This emphasis closely reflected the concerns set out in the WA Inc Royal Commission reports, where findings of improper conduct were far more common than findings of actual corruption, as well as the COG report which laid out much of the machinery of the whistleblower protection scheme eventually adopted in 2003.

The Government argued that one purpose of the Bill was:

> *…to use existing agencies to provide protection for people making disclosures and to encourage as a result a culture of disclosure and more ethical behaviour within the public sector… the purpose of this Bill is to move towards changing culture.* (Griffiths, 11/03/03:5062-64)

The main mechanisms in the legislation for ensuring compliance by agencies and departments revolved around the role of the Commissioner for Public Sector Standards. The Commissioner had no investigatory functions and so was not named as a 'proper authority' for the purposes of a whistleblower reporting. However, not only was the Commissioner to develop a code specifying the minimum standards for making and receiving a public interest disclosure, but provisions were made for all agencies to report on the number of disclosures made, the result of any investigation, including any action taken as a result of an investigation. The Commissioner was charged with reporting annually to parliament on compliance with the Act, thereby publicly reporting on the implementation and effectiveness of the legislation.

The Opposition expressed some concern that if the Commissioner's annual reports were merely statistical, for example '*10 disclosures received; no action taken'*, that no meaningful information would be made available (Halligan, Hansard, 11/03/03:5060). The Government's response was that the parliament would be able to deal with any issue of insufficient reporting '*in the light of experience'* - that experience also potentially revealing the need for any amendment to the Act:

> *I anticipate that as the Commissioner for Public Sector Standards makes his reports over time, matters may give rise to the requirement to amend… but if a report from the commissioner were not up to scratch .. the Parliament would be in a position to act.* (Griffiths, Hansard, 11/03/03:5064-5)

The Office of the Public Sector Standards Commissioner was given a budget enhancement to be used for developing the code and guidelines and assisting with the implementation of the Act (Gallop, Hansard, 20/05/03:70a).

With comparatively little in the way of contention, the Western Australian *Public Interest Disclosure Act 2003* was passed by Parliament in May 2003 and assented to on 3 June 2003.

## Provisions of the legislation

The Western Australian legislation has the same aims as the legislation in Queensland and New South Wales in seeking to facilitate the disclosure of public interest information and to protect those who make disclosures. It is different in that there are no restrictions on who the protections apply to, reflecting perhaps the extensive corrupt relationships between members of the government and the private sector.

Section 5 of the Act includes an extensive list of persons and agencies to whom a public interest disclosure can be made - 'proper authorities' - and what should be reported to whom. This includes not only front-line departments, but also a range of accountability agencies as well as, in certain circumstances, the Chief Justice or the Presiding Officers of Parliament. The latter persons are not required to comply with some provisions of the Bill, including investigation, taking action, notifying the informant or reporting to the Commissioner for Public Sector Standards. Importantly, however, if an investigation is not carried out, a whistleblower is entitled take the disclosure to another 'proper authority'.

Unlike either New South Wales or Queensland, provisions in the legislation explicitly require investigation of a disclosure, except where the 'proper authority' deems the matter to be trivial, the disclosure vexatious or frivolous, there is no reasonable prospect of obtaining sufficient relevant information because of the passage of time since the alleged conduct, or adequate and proper investigation is being undertaken by an alternative agency. Provisions were also made for the informant to be notified of action taken or any decision not to investigate – not least so that they had an option to

approach an alternative agency should they believe their disclosure was being inappropriately dealt with.

Part 4 of the Act sets out the specific obligations of the Commissioner for Public Sector Standards to monitor compliance with the Act and to assist public authorities and public officers with compliance. As noted above, this responsibility includes establishing '*a code setting out minimum standards of conduct and integrity to be complied with by a person to whom a disclosure of public interest information may be made*' (s.20) and preparing guidelines on internal procedures for proper authorities (s21). Part 4 also details the Commissioner's annual reporting requirements which includes not only the performance of the Commissioner but also more generally compliance or non-compliance with the Act and the code established by the Commissioner.

The *Public Interest Disclosure Regulations* enable proper authorities to enter into written arrangements to avoid duplication of action, to enable the efficient and economical use of resources, the achievement of effective results and to ensure records of disclosures are securely stored.

## Analysis

The Western Australia Commission on Government made detailed recommendations about a scheme for the protection of whistleblowers in 1995. The Gallop Government, elected nearly a decade later, took up many of these recommendations in the drafting of its *Public Interest Disclosure Bill*.

In Western Australia 'any person' is protected for making public interest disclosures in accordance with the legislation. This is reflective of the deeply corrosive relationships between corrupt government ministers and private sector interests, WA Inc, and the revelations of the royal commission.

As with Queensland and NSW, internal reporting options were afforded protection as well as reporting to external accountability agencies. There was some criticism of the Ombudsman's Office during the debate, based on the treatment of a whistleblower in the Ombudsman's office but no systematic criticism of any particular agency.

The Corruption and Crime Commission replacing the ACC, which had been criticised by a Royal Commission into police misconduct, was established in the same year as the *Public Interest Disclosures Act* was passed and was named as a 'proper authority' for the purpose of public interest disclosures. The government refused to establish a new body to receive and investigate disclosures by whistleblowers, arguing that the flexible reporting options and the review mechanisms built into the legislation provided significant protection of the reporter while ensuring the allegation(s) would be properly dealt with.

There was no discussion about the option of providing protection to whistleblowers making disclosures to the media or to MPs.

As in other jurisdictions, both Government and Opposition members were concerned that whistleblowing should not be viewed as an end in itself, but a tool to be used in the broader aim of improving the ethical culture of government and the public sector in Western Australia. A significant two-fold role was therefore given to the Commissioner for Public Sector Standards. The Commission was to assist with the implementation of the *Public Interest Disclosures Act* by way of developing a model reporting code for agencies, and would have an ongoing role in monitoring the operation of the legislation. The Commission would also provide detailed and meaningful reports to the parliament on the effectiveness of the legislation. Although there are many similarities between the whistleblower statutes in each State, there is no equivalent concern with ensuring the effective implementation of the legislation.

## Conclusions

Whistleblower legislation was introduced in each of the jurisdictions as part of the government's commitment to improving the accountability and transparency of government. Specific reference was made to the need to improve the culture of the bureaucracy in Queensland and Western Australia where royal commissions had revealed extensive corruption. In each State it was made clear that whistleblowing was not to be seen as an end in itself but rather as a mechanism that supported and

supplemented existing integrity structures. This is consistent with the views of some academic commentators:

> *The whistleblower serves only as a vehicle for bringing to attention a matter which an appropriate body already has the power to investigate: the only matter of relevance is the substance of the disclosure.* (Whitton 1995 cited by Goode 2000:45)

In no jurisdiction was a new agency established to receive and investigate whistleblowers' disclosures or to provide support and counselling for whistleblowers. Existing accountability agencies were seen by governments as providing sufficient means for reporting and investigating disclosures despite strong reservations about the efficacy and independence of some agencies being voiced by Opposition members. Only in New South Wales, where the Government was in a minority, was a provision enacted to protect disclosures to the media and MPs, and only then following stringent requirements for reporting within the bureaucracy. This provision arose from a generalised concern about the possibility of institutional failure, not the specific criticisms aimed at particular accountability agencies in the other States, and was possible because of the strong position of the Independent Members who championed the cause.

Despite the importance attributed to the roles and responsibilities of accountability agencies, none of the Acts describe in much detail the actions to be taken when disclosures are received. No new powers to deal with disclosures were given to any agency, with the exception of increasing the jurisdiction of nominated agencies to investigate allegations of reprisal action against whistleblowers. As noted earlier, the Acts provide broad frameworks within which these agencies were to establish their own procedures for dealing with disclosures. Legislative provisions requiring the development and implementation of procedures was only enacted in Western Australia.

Each Parliament made provisions for reporting on the success or otherwise of the implementation and operation of the legislation. In NSW and Queensland there were unspecified concerns about the possible misuse of such information and so minimal reporting was prescribed. In Western Australia the focus was much more strongly on whether the Commissioner for Public Sector Standards would in fact report in sufficient

detail to enable the Parliament to make a proper assessment of the impact of the legislation. In addition, Western Australia was the only jurisdiction where an agency was given a coordinating and monitoring role and where the development of a code and guidelines for the implementation of the Act was formalised in the legislation.

The legislative frameworks for whistleblowing analysed above are consistent with the 'obtaining information' component of accountability. Providing retrospective protection for whistleblowers was the only specific requirement aimed at whistleblowers. None of the statutes include any provisions that might address the particular needs of whistleblowers or encourage them to trust the approved authorities: it was merely assumed that whistleblowers would report as a result of the increased protection.

The legislation prescribes no additional requirements to ensure investigation or rectification of wrongdoing revealed by whistleblowers, relying solely on the existing capacity of accountability structures and institutions. This is surprising given the emphasis in each State on the need to improve ethical standards of public administration.

As Goode comments about statutory whistleblower protection: '*legislation can do very little more than sketch boundaries within which judgement must be made'* (Goode 2000:41). It might not be possible to regulate how accountability agencies would approach this particular area of public administration (Dyerson and Mueller cited in Howlett and Ramesh 2003:105). However, the absence of guidance by a nominated agency, except in Western Australia, did mean that implementation of the legislation became the responsibility of a range of agencies with different purposes and ways of operating, thereby increasing the risk of inconsistent policies and procedures for dealing with whistleblowers and their protected disclosures.

Despite difference emphases in the parliamentary debates and the form of the statutes protecting whistleblowers and their disclosures, the core objectives were the same. The legislation was enacted to (i) to facilitate the making of disclosures, (ii) ensure their disclosures are properly dealt with and (iii) ensure the protection of whistleblowers.

Examining how accountability agencies approached these tasks is the subject of the following chapter.

# Chapter 4 Implementation of the legislation: roles of accountability agencies

> New knowledge is the most valuable commodity on earth. The more truth we have to work with, the richer we become. (Kurt Vonnegut)

## Introduction

As discussed in the previous chapter, the whistleblowing legislation in each jurisdiction under consideration is aspirational in intent as well as providing a broad framework for protecting whistleblowers and taking action on their disclosures. As is the case with much administrative law, the task of making the legislation operational, by way of developing and implementing policies and procedures, has been left to agencies themselves. '*Laws establish a framework for government action but much of the detail is contained in regulations .... More detail is found in discretionary administrative decisions'* (Althaus *et al* 2007:95).

External accountability agencies have roles to play both in receiving and investigating disclosures of wrongdoing, recommending action to remedy wrongdoing and in providing advice and support to departments in their respective States about implementing whistleblowing procedures thereby strengthening accountability. Their roles are therefore pivotal in institutionalising the intent of the legislation. This is in line with the statement of Calland and Dehn about the three-fold purpose of protecting disclosures to external agencies:

> *... without there being an external body to which staff may safely and openly go, some employees will lack the confidence to believe that any internal scheme is a genuine attempt to hear and address such concerns. Secondly, asserting the role of such an outside body (be it a regulator, parliament, shareholders or the wider public) makes real the principle of accountability by reminding everyone in the organisation who is accountable for what and to whom… Finally, the clear message that employees have a safe external route is a powerful incentive for managers to promote and deliver the organisation's own whistleblowing scheme.* (Calland and Dehn 2004:7-8)

As Calland and Dehn indicate, for whistleblowing schemes to work, it is important that potential reporters are aware of the general thrust of the legislation and of more specific details about who they can report to and about what, how they will be protected and how their disclosures will be dealt with. Parliaments which have passed laws implementing whistleblower schemes need to be informed of the success or otherwise of the effectiveness of laws in improving accountability in the public sector so that any necessary changes can be contemplated, and hopefully made.

The first focus of this chapter is on departmental guidelines for reporting of wrongdoing. It is not the purpose here to evaluate the strength or otherwise of such guidelines in their entirety, but to assess the clarity and usefulness of advice provided, particularly on the role of external accountability agencies. Existing research, including the WWTW findings, indicates the significance of departments developing and publicising such guidelines (Roberts 2008, Lewis 2006, Lewis *et al* 2001). This chapter utilises the analysis of departmental policies and procedures by the WWTW project.

It will be argued in this chapter that accountability agencies have established systems for receipt and investigation of protected disclosures, but have, with some exceptions, fallen short of providing substantial information to parliaments or the public about the operation of the legislation and its effectiveness in improving integrity in public sector institutions or in protecting whistleblowers. In addition, it will be shown that the information available to potential whistleblowers is of very variable quality, accessibility and usefulness. Two main sources of publicly available information are utilised: annual reports to parliaments and accountability agency websites.

Annual reports are a main source of information for parliaments on the operation of public departments, both financial and performative. As already discussed, they are an important accountability mechanism. The information about accountability agencies' implementation of the legislation is taken primarily from the annual reports of those agencies. To be useful to parliaments, these reports need to include information on how many disclosures have been made, how they have been dealt with, outcomes of inquiries or investigations and any relevant information about outcomes for the reporters. Results of legislative reviews and other work identifying deficiencies and

possible remedies could also be usefully included in the reports. As already discussed, the need to report to at least some extent on the implementation of whistleblowing legislation was a point made in all the parliamentary debates. The review of annual reporting reveals a wide variation in agencies' responses to the concern.

The reports used are those for the year in which the whistleblower scheme was implemented, if the agency existed at that time and if the report is available, and for the period covered by the WWTW research, July 2002 to June 2004. In some instances a reported item makes little sense without additional information from either the prior or subsequent reports; in these cases those reports are also examined.

Websites are a readily accessible source of public information. It is one way in which the organisation can promulgate an understanding of its role and purpose and assert its reliability and reputation.

Accountability agency websites have been accessed to obtain information about how agencies offer advice about their specific roles and responsibilities in relation to whistleblowing. Although it is not possible to tell what those websites would have specifically advised potential reporters in the period 2002-2004, it is assumed that current advice is at least indicative of earlier information about the roles and responsibilities of the agencies. To be useful to potential reporters, relevant advice should include specific detailed information about what allegations the agency might investigate, expectations of the potential reporter and the kind of evidence that would be necessary to support allegations, what kinds of action might be taken on a disclosure and how the reporter will be protected. Processes for obtaining further advice from the agency and an address for written disclosures are, of course, also essential. The assessment of information on websites reveals once again range of approaches and useful information. Some correlations between the information published and disclosures to the agency are observed.

The review of published information is organised around the four different types of accountability agencies given responsibilities under whistleblower legislation which are the subject of this thesis.

## Departmental procedures

An immediate and practical barrier to utilising accountability agencies is that not all reporters are aware of their right to report externally, or how to contact accountability agencies or how then to present their reports of wrongdoing.

The whistleblowing policies and procedures of agencies which participated in the WWTW Agency Survey were evaluated and the results of that evaluation published in '*Whistleblowing in the Australian Public Sector*' in 2008. Roberts reported that there was no significant relationship between the proportion of employees who were confident that they would be protected under the relevant legislation and the reporting rate or subsequent treatment of whistleblowers, and suggests that confidence in the legislation might be therefore primarily based on its symbolic intent rather than its observable effect (Roberts 2008:243). On the other hand, Roberts' analysis indicates '*... a modest positive relationship between the comprehensiveness of an agency's procedures and the proportion of staff members who report the serious wrongdoing they observe*' (Roberts 2008:256).

Evidence for this proposition was based on a comparative evaluation of 175 agencies' internal procedures based on the Australian Standard *Whistleblower Protection Programs for Entities* (AS8004-2003), with additional items added by the WWTW Research Team. These additional items included matters such as 'ease of comprehension'; a commitment that reporting would be 'confidential and secure within the law'; a commitment that staff would not suffer disciplinary action; active management and support of internal witnesses; procedures for assessing the risk of reprisal against individual whistleblowers and for responding to reprisals, including investigative action; and sanctions for making false or frivolous allegations (Roberts 2008:246). Procedures were rated on a scale of between 0-3 (0 = no mention, 1=brief mention, 2=reasonably strong, 3=extremely strong). The evaluation showed a wide variation in the content of agency procedures, with overall quite low standards. None of the items in any agency's procedures reached even a score of 2 (reasonably strong/ comprehensive) (Roberts 2008:255).

'*To whom and how whistleblowing concerns can be directed (externally) and in what circumstances'* was one item evaluated and, compared with other items, was shown to be reasonably comprehensively represented in agency procedures, scoring a mean of 1.51. This procedure generally provided basic information about which accountability agencies could receive a protected disclosure, their general jurisdiction and the circumstances in which reporters could approach them. In some cases, notably in Western Australia, contact details including web addresses, were given. Lewis had made the point as a result of research in the United Kingdom (UK) that it was in an employer's interests to specify who they regarded as appropriate recipients of disclosures and it was therefore not surprising that relevant information was included in procedures (Lewis 2006:81).

The overall rating of course includes a range of individual ratings. The analysis of the procedures for agencies in each of New South Wales, Queensland and Western Australia revealed that some included no reference to external reporting options in their procedures while others, as noted above, provided additional contact details. The importance of the inclusion of this advice is indicated by a further analysis which assessed correlations between specific items in departmental procedures and whistleblower protection and support. One of the nine items identified as being more likely to be present when employee survey respondents indicated better treatment by managers and co-workers, or more positive attitudes to reporting, is advice covering external reporting options (Roberts 2008:257).

The most consistent weakness identified in departmental procedures was in items related to the protection and support of whistleblowers. Procedures for assessing the risk of reprisal against whistleblowers, for investigating reprisal action, and statements of rights of whistleblowers to request positive protective action were the three lowest scoring items in the evaluation (Roberts 2008:246-248):

> *Agencies often appear to recognise the practical benefits of reporting from a management perspective without addressing the importance of whistleblower welfare – whether for its practical value in sustaining a positive reporting climate and reducing the costs of conflict or in recognition of other legal and ethical responsibilities towards employees. In the majority of agencies, procedures need substantial*

> *review to achieve a more effective balance of approaches.* (Roberts 2008:250)

This finding is particularly significant because as discussed above, and supported by the analysis of empirical data, external accountability agencies refer the majority of disclosures back to departments for investigation and rectification, with very little ongoing oversight. In such cases, the value to the whistleblower of reporting externally is hard to see.

Another important finding of the WWTW evaluation was that the production of model guidelines for use by departments in establishing whistleblower schemes appears to influence the quality of the subsequent departmental procedures. The NSW Ombudsman and the Office of the Public Sector Standards Commissioner (OPSSC) in Western Australia have both produced such guidelines, the NSW Ombudsman by choice and the OPSSC in compliance with the legislation. The OPSSC specifically references the NSW Ombudsman's work (PID Guidelines 2006 pii). In Western Australia, departments are required to produce internal procedures that are at least consistent with the OPSSC guidelines (OPSSC website). In New South Wales there is no requirement for departments to adopt the NSW Ombudsman's guidelines, but most have modelled their internal procedures on the guidelines.

The usefulness of the guidelines provided by the NSW Ombudsman and the OPSSC is reflected in an assessment of the comprehensiveness of agency procedures. Roberts notes that the evaluation of whistleblowing procedures was based on a measure of the completeness of relevant documentation but, as many other factors bear on the effective management of whistleblowing, procedures in themselves do not guarantee good outcomes:

> *...this is likely to hinge on management commitment, promulgation of the procedures and effective resources devoted to investigation and to supporting staff. Nevertheless, the evidence suggests that these factors are also more likely to be present in those organisations that take the trouble to develop more comprehensive whistleblowing procedures.* (Roberts 2008:259)

One issue associated with the use of model procedures is that because they are prescriptive (Lewis 2006:220) departments can adopt them without much thought,

including statements on their commitment to whistleblowing. Although not reported by Roberts, all the departments in Western Australia and a significant number in New South Wales simply incorporated without change the 'model' text, including paragraphs about the organisation's opinion of reporting wrongdoing through appropriate channels and the organisation's commitment to whistleblower protection.

The results of this evaluation indicated that, although procedures were still assessed as being overall less than reasonably strong or comprehensive, New South Wales and Western Australia scored better than Queensland with Queensland having the largest number of agencies with low scores (Roberts 2008:249). Even if this is evidence simply of the capacity of the NSW Ombudsman and the OPSSC to develop better guidelines than departments working on their own, the correlation between comprehensive guidelines and the propensity of whistleblowers to report the wrongdoing they observe is not undermined.

The comprehensiveness of information published by external accountability agencies is the subject of the remaining sections of this chapter. A summary table is included at the beginning of the section on each type of accountability agency to provide a guide through the sometimes dense details that follow. These tables present a systematic, if broad, evaluation of the quality of information provided both in annual reports and on websites. Information has been assessed as 'none/minimal', 'adequate/reasonable' or 'very informative'. All the websites have been updated since the assessment below was completed in 2008 and the links and pages are no longer accessible. For this reason, references to specific pages are not given, only the general office website.

## Ombudsmen

The results of the assessment of information published by ombudsmen in annual reports and on their websites are set out in Table 4.1 below followed by more detailed analysis of the information itself. The quality and quantity of information provided by these agencies is quite variable. Only the NSW Ombudsman provides detailed and useful information both in reports and on its website. Annual reports by the ombudsmen in Queensland and Western Australia provide minimal information indicating nothing more than compliance with annual reporting requirements.

**Table 4.1: The adequacy of information published by Ombudsmen**

| | Ombudsmen | | |
|---|---|---|---|
| State | Queensland | New South Wales | Western Australia |
| Annual reports | 1 | 3 | 1 |
| Website | 2 | 3 | 1 |

**Key:** 1 = 'none/minimal'; 2 = adequate/reasonable'; 3 = very informative

## Ombudsmen's offices: annual reports

### *Queensland Ombudsman*

The *Whistleblowers Protection Act 1994* gave the Queensland Ombudsman authority to investigate whistleblower complaints about matters already within its jurisdiction, that is maladministration or '*the actions and decisions of Queensland public agencies and their staff that may be unlawful, unreasonable, unfair, improperly discriminatory or otherwise wrong"* (Queensland Ombudsman website).

The Ombudsman's annual report of 1994-95 did not introduce its new responsibility with any fanfare. A single page sets out the annual reporting requirements of all public sector entities, advises that the Ombudsman's Office is an appropriate entity to receive disclosures about maladministration and discusses the possibility of overlap between the Ombudsman's existing complaint jurisdiction and that under the *Whistleblowers Protection Act*, concluding that '*the overlap is not of great concern*'. The Ombudsman does note that his belief is that:

> *...the intention of the Act was for me to report to Parliament matters where public spirited persons within the public sector have brought to my attention maladministration that didn't necessarily affect them directly but which they thought should be brought to my attention in the public interest.*

The report then notes that only two '*true whistleblower disclosures*' had been received since the Act commenced, one of which was referred back to the agency concerned because the Ombudsman did not believe the whistleblower would suffer any reprisals, and the second was referred on to the Criminal Justice Commission (Queensland Ombudsman Annual Report 1994-95:15).

Subsequent annual reports give little additional insight into the Ombudsman's role in relation to whistleblowers' disclosures. In fact the 1995-96 report indicates a rather dismissive, certainly unhelpful, view of the role by the Queensland Ombudsman:

> *Obviously I receive many complaints by public officers about their own workplace situations. Technically I believe these meet the definition of whistleblowing but I don't regard them as such.* (Queensland Ombudsman Annual Report 1995-96:39)

No explanation is offered as to why these complaints were not regarded as 'real' whistleblowing and two others were classified as legitimate and taken up for investigation. Certainly no reference is made to a public interest threshold in making the determination.

There is no mention of whistleblowers or public interest disclosures in the Queensland Ombudsman's annual report for 2002-03. It is not known whether this was an oversight but it seems likely as Appendix G of the previous year's report, entitled '*Whistleblowers*', reported the receipt of five whistleblower public interest disclosures during the year, all of which were '*under consideration as at 30 June 2002'*. This information is provided in three scant lines of text (Queensland Ombudsman Annual Report 2001-02:89). No report on the outcome of these five disclosures is included in the 2002-03 report.

The report for 2003-04, in a section entitled '*Governance*', notes the office's requirement to report on public interest disclosures about its own conduct or the conduct of agencies/entities within its jurisdiction. It reports that two public interest disclosures about other agencies were made during the year and that both were '*still under consideration*' (Queensland Ombudsman Annual Report 2003-04:52).

These annual reports give little or no sense of how the Queensland Ombudsman was implementing the whistleblower protection legislation. They do observe the requirement in the legislation to report on statistics, but serve no purpose in informing the Parliament or anyone else on the success or otherwise of the whistleblower scheme in Queensland. The reports tend to give the impression that the Queensland Ombudsman placed no value on whistleblowers or the whistleblowing scheme as part of the accountability system in the State.

### *NSW Ombudsman*

The Ombudsman's annual report for 1995-96 was the first to include information about what it called one of the 'newer' areas of its work. The Ombudsman's overview sets out the office's work in dealing with disclosures; developing guidelines to assist potential whistleblowers and public authorities; giving advice to potential whistleblowers and public officials; and dealing with complaints about the implementation of the Act. An eight page subsection of the report entitled '*Protected disclosures*' gives detailed information about the objects of the act, the role of the Ombudsman, the 51 disclosures received (including several examples of the types of disclosures) and other issues arising like the difficulties in protecting whistleblowers. Advice is also given about good administrative practices that might be adopted by departments (NSW Ombudsman Annual Report 1995-96:142-150).

This report also details several submissions the Ombudsman had made to the parliamentary committee that was reviewing the Act. There is considerable emphasis in this and subsequent annual reports on the operation of the Act and its limitations. The identified limitations have led the Ombudsman to focus much attention on the need for changes in public service culture concerning whistleblowers and the development of good internal procedures and their adoption by every public service agency (NSW Ombudsman Annual Report 1995-96:148).

Each annual report since the commencement of the *Protected Disclosures Act 1994* includes information on the number of protected disclosures received. Case studies in each report provide additional detailed information about individual matters, including the agency's response to the protected disclosure and any intervention by the Ombudsman. Each report also identifies any broader themes or issues identified by the Ombudsman. The report then provides relevant advice. For example, in the 2002-03 report there is a section on prerequisites for a disclosure to be protected (NSW Ombudsman Annual Report 2002-03:54). Alternatively, the issue and possible approaches are canvassed: both the 2002-03 report (p55) and the 2003-04 report (pp104-107) have quite lengthy sections on confidentiality requirements, difficulties and ways of approaching the problems.

The 2003-04 report in particular states the Ombudsman's view that the Act had not achieved its original objectives. It summarises the deficiencies the Ombudsman's review had found:

> - *there is no obligation on senior management to protect whistleblowers or establish procedures to protect whistleblowers*
> - *there is no central agency responsible for monitoring how well the scheme is working - this includes collecting data on how many protected disclosures are being made to particular agencies, how many have been made since the Act commenced, and how those disclosures are being handled*
> - *it is the only Australasian whistleblower legislation in which the whistleblowers themselves have no direct right to seek damages for detrimental action.* (NSW Ombudsman Annual Report 2003-04:106)

The report of 2002-03[5] includes a five year comparison of protected disclosures received but not the action taken in response or any outcomes (NSW Ombudsman Annual Report 2002-03:64). Six case studies giving considerable detail about the investigative response to protected disclosures or issues raised by internal complaints are included in both the general '*Investigations and complaint resolution'* and the specific '*Protected disclosures'* sections of the report (NSW Ombudsman Annual Report 2002-03:26,29,30,54-55).

Table 4.2 below reproduces a ten year comparison of the numbers of protected disclosures received by the Ombudsman (NSW Ombudsman Annual Report 2003-04:104). Overall, the rate is quite stable. The increases in numbers in the earlier years can probably be explained by information becoming available to potential whistleblowers about the availability of new protections. While it is not clear is why numbers of protected disclosures peak in 1998-99 and are significantly lower in subsequent years, and no explanation is proffered in the report, the trend contrasts with the reported rise in general complaints received by the NSW Ombudsman. General complaint matters to the Ombudsman increased by more than 12 per cent from 2001-02

[5] In the interests of transparency, it should be noted that the author of this thesis was employed by the Ombudsman's office until 2005 and was the editor of the NSW Ombudsman's Annual Report 2002-03 and the investigator of a number of the protected disclosures.

to 2002-03 (NSW Ombudsman Annual Report 2002-03:24) and more than 9 per cent from 2002-03 to 2003-04 (NSW Ombudsman Annual Report 2003-04:64). The rise in general complaints may well be indicative of the general good standing of the office and more awareness of its broad role compared with its role in relation to protected disclosures.

**Table 4.2: Protected disclosures received by NSW Ombudsman – ten year comparison**

| | 94/95 | 95/96 | 96/97 | 97/98 | 98/99 | 99/00 | 00/01 | 01/02 | 02/03 | 03/04 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Oral | 19 | 70 | 95 | 119 | 87 | 65 | 56 | 34 | 58 | 30 | 633 |
| Written | 7 | 66 | 84 | 97 | 113 | 78 | 97 | 75 | 75 | 105 | 797 |
| Total | 26 | 136 | 179 | 216 | 200 | 143 | 153 | 109 | 133 | 135 | 1430 |

While once again no information is provided on the investigative response to or outcome of these disclosures, the report has three case studies involving protected disclosures or issues raised by internal complaints, for example the Ombudsman's attempts to resolve apparent reprisals against a whistleblower (NSW Ombudsman Annual Report 2003-04:103-105).

From the above it is clear that the NSW Ombudsman has made extensive use of his annual reports to Parliament, not only to report on the disclosures dealt with by the office, but also to raise issues with the legislation and the implementation of whistleblower protection in New South Wales.

### *Western Australian Ombudsman*

The WA Ombudsman's annual report for 2003-04 is the first to include information about its new responsibilities since the Act commenced on 1 July 2003, the first day of the reporting period. In a section entitled '*Overview of other activities*' three paragraphs detail the new responsibility for public interest disclosures setting out only the basic information about the Ombudsman's role (i.e. receipt and investigation in accordance with existing procedures). It also reports that the office *'received a small number of*

*disclosures during the year and one of those is currently the subject of an investigation'* (WA Ombudsman Annual Report 2004:41).

The annual report for 2005 records the receipt of only one disclosure during the year, and the ongoing investigation of a '*complex disclosure raised with us the previous year*' (WA Ombudsman Annual Report 2005:39).The ongoing investigation is reported in the 2006 annual report in more detail:

> *We continued the investigation of a number of complex disclosures received previously and completed the investigation phase of a major inquiry concerning metropolitan residential care facilities, or hostels, operated by the Department for Community Development. We will report on that matter in next year's report.* (WA Ombudsman Annual Report 2006:40)

The 2007 report continues to focus on the matter the subject of investigation, not anything related to the whistleblower. While the Parliament had given more extensive reporting responsibilities to the Commissioner for Public Sector Standards, the WA Ombudsman could still have been more informative about its implementation of whistleblower legislation and its dealings with whistleblowers.

Detailed analysis of State ombudsmen's annual reports show that only the NSW Ombudsman took advantage of the opportunity to provide detailed information to the Parliament on its responsibilities for whistleblower protection. The reports by the Western Australian Ombudsman indicate mere compliance with annual reporting obligations. Except for the somewhat disparaging commentary from the Queensland Ombudsman, these reports also indicate mere compliance with reporting requirements.

## Ombudsmen's offices: websites

The websites of the Queensland and NSW Ombudsmen both provide useful information to those seeking advice on whistleblowing in those States. The Western Australian Ombudsman's website provided no information about that office's role.

### *Queensland Ombudsman*

The front page of the Queensland Ombudsman's website has no 'flag' indicating specific provisions for whistleblowers. Under its general link entitled '*Make a*

*complaint*' there is relevant and accessible '*Advice for whistleblowers'*. This advice is provided under subsections entitled:

- *What is a Whistleblower?*
- *Why is it important to make a complaint?*
- *What should I consider before making the complaint?*
- *Can I make a complaint anonymously?*
- *What protection is available if I make a complaint?*
- *Will I be kept informed on the progress and outcome of the investigation?*
- *Does the Ombudsman investigate all disclosures?* (Queensland Ombudsman website)

### *NSW Ombudsman*

Although information about protected disclosures is, like the Queensland Ombudsman's webpage, somewhat buried in a generic window on the NSW Ombudsman's webpage entitled '*What you can complain to us about*', the information itself is comprehensive and in non-technical language. It includes information about

- *The role of the Ombudsman*
- *What is a protected disclosure?*
- *How do I make a protected disclosure?*
- *What is detrimental action?*
- *How the Ombudsman handles protected disclosures and complaints of detrimental action*
- *Useful publications and other useful resources (NSW Ombudsman)*

There are additional links to information brochures and fact sheets for whistleblowers and departments, all of which provide relevant information, a link to the current edition of *Protected Disclosure Guidelines* and to a discussion paper on the adequacy of the Protected Disclosures Act published by the Ombudsman in April 2004 (NSW Ombudsman website).

### *Western Australian Ombudsman*

There is no advice or information about the Ombudsman's jurisdiction in relation to public interest disclosures on the agency's website, except details of a contact person on a page called '*About Us*' (Western Australian Ombudsman). There is nothing specific

about the Ombudsman's role in the general pages on making complaints. There is however a link, on a page called '*Other Complaint-Handling Bodies*' which refers the inquirer to the public interest disclosure site published by the Office of Public Sector Standards Commissioner, which is reviewed in detail below (Western Australian Ombudsman website).

## Analysis of the quality of information provided by ombudsmen

While useful and reasonably accessible advice about general issues related to whistleblowing is given on the Queensland Ombudsman's website, almost no information is available either electronically or in annual reports that might give the Queensland Parliament, the public or indeed potential whistleblowers much idea of how other whistleblowers have fared, or how the Queensland Ombudsman's office has dealt with complaints it has received.

The NSW Ombudsman provides a wealth of information about using the *Protected Disclosures Act*, its concerns about the usefulness of the legislation and the disclosures it has received. Detailed information about quite a number of cases is also provided indicating the outcomes of inquiries or investigations. Little information is provided, however, about how reporters would be protected with only issues about confidentiality raised and there is no reporting on reprisals apart from the case study referred to above. Notwithstanding this limited attention to protection and reprisals, compared to the information available to potential whistleblowers in Queensland, those working in the NSW public sector would have a reasonable idea about what to expect from approaching their Ombudsman.

The scant information in its annual reports, and the onward referral of inquiries to another body, give rise to an apprehension that public interest disclosures are not of much interest to the Western Australian Ombudsman. Neither the annual reports nor the website offer much encouragement to potential whistleblowers.

The websites of all three State Ombudsmen include at least basic information about the roles and responsibilities of the agencies indicating that these accountability agencies are providing an external reporting option. The absence of any discussion about what protection would actually be viable and how the agency would respond to allegations of

reprisals against the reporter is somewhat surprising given the focus of the Act on the protection of whistleblowers.

Only the NSW Ombudsman's annual reports give any indication that the office uses protected disclosures to improve standards of public administration. Given the specific points made in the parliamentary debates in about the importance of the legislation in contributing to improved accountability, it is surprising to find that neither the WA nor Queensland Ombudsmen indicate much interest.

## Corruption/Crime Commissions

The results of the evaluation of information provided by corruption/crime commissions is summarised in the table below, with more detailed analysis following. It is apparent from the outset, however, that the information provided by the Corruption and Crime Commission in Western Australia is of a much lower standard than equivalent agencies in other States.

**Table 4.3: The adequacy of information published by corruption/crime commissions**

| | corruption/crime commissions | | |
|---|---|---|---|
| State/agency | Queensland CMC | New South Wales ICAC | Western Australia CCC |
| Annual reports | 2 | 2 | 1 |
| Website | 2 | 2 | 1 |

**Key:** 1 = 'none/minimal'; 2 = adequate' 3 = very informative

### Corruption/crime commissions: annual reports

#### *Crime and Misconduct Commission (CMC) - Queensland*

Under the *Whistleblowers Protection Act 1994*, the CMC was given additional responsibility for investigating allegations of reprisals, and the power to apply to the Supreme Court for an injunction about a reprisal, if the reprisal was against a public servant and if the reprisal is an act or omission within its jurisdiction.

In its annual reports of 2002-03 and 2003-04, the CMC reported on its work with whistleblowers under sections entitled '*Raising public sector integrity'* where the focus was on conducting risk management or organisational reviews. The explanatory paragraph is fundamentally the same in both reports:

> *Experience has shown that misconduct often flourishes in organisations that have poor internal controls or inadequate reporting procedures, as these help to conceal corrupt activities, protect wrongdoers from exposure, and lead to the victimisation or harassment of whistleblowers. By examining management and administrative deficiencies, risk management reviews help agencies analyse how they control and prevent misconduct, and help them identify the weak points and loopholes that might be exploited by unscrupulous people.* (CMC Annual Report 2002-03:40)

The other mention of whistleblowers or public interest disclosures appears in Appendix D of both annual reports. Each appendix includes a table with a number of details about the public interest disclosures received by the CMC, including the types of allegations made and how they were dealt with by the CMC. In 2002-03 there were 147 complaints received comprising 440 allegations (CMC Annual Report 2002-03:70); in 2003-04, 133 complaints were received comprising 429 allegations (CMC Annual Report 2003-04:78). The details are combined below in Table 4.4.

Although the statistical information is quite detailed, no explanation or commentary is included in either report so little can be learned, for example, about the huge rise in complaints of reprisals in 2003-04, or the reason for the CMC referring the majority of public interest disclosures to other agencies. Equally, the CMC reported that it did not verify any allegations received in this two year period, including allegations of reprisals but provided no explanation. It is not possible to tell whether this was due to evidentiary problems, technical legal issues, frivolous or false complaints or in fact limitations on the extent of investigative action arising from resource constraints faced by the CMC.

**Table 4.4: Whistleblower complaints dealt with by the Crime and Misconduct Commission 2002-04**

| Section of Whistleblowers Protection Act | Verified (by CMC) | | Not Verified (by CMC) | | Referred to other agency | | Under consider-ation by CMC | | Total referred and not verified | | Total referred and verified | | Totals | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **(Financial year)** | 02-03 | 03-04 | 02-03 | 03-04 | 02-03 | 03-04 | 02-03 | 03-04 | 02-03 | 03-04 | 02-03 | 03-04 | 02-03 | 03-04 |
| 15. Public officer complaining of official misconduct | - | - | 70 | 54 | 152 | 184 | 6 | 33 | 113 | 84 | 40 | 32 | 381 | 387 |
| 16. Public officer complaining of maladministration | - | | 2 | 3 | 7 | 1 | - | - | 10 | 2 | - | - | 19 | 6 |
| 17. Public officer complaining of improper management | - | - | 2 | - | - | - | - | 11 | - | 1 | - | - | 2 | 12 |
| 18. Public officer complaining re health/ environment matter | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| 19. Any person complaining re public health or safety matter | - | - | - | - | 1* | - | - | - | 1 | - | - | - | 2 | - |
| 20. Any person complaining re reprisals | - | - | 21 | 60 | 5* | 204 | 2 | 4 | 8 | 89 | - | 32 | 36 | - |
| Totals | - | | 95 | - | 165 | - | 8 | - | 132 | | 40 | - | 440 | 405 |

* The outcomes of the allegations in this category may not be known at the time of reporting, or may never be known, because they were referred to another agency with no need for review by the CMC.

The 2003-04 report includes an additional paragraph explaining why the Minister for Families had not breached the *Whistleblowers Protection Act* when she named a whistleblower in parliament (CMC Annual Report 2003-04:31). Overall, however, the reporting of statistics with little explanation provides limited information about the CMC's role in relation to whistleblowers or whether the CMC believed their disclosures to be useful in improving accountability.

### *Independent Commission Against Corruption (ICAC) – New South Wales*

ICAC's annual report for 1994-95, the first after the proclamation of the *Protected Disclosures Act*, reports that the Act came into effect but does not expand on its purpose or provide any contextual information. The report refers to the Commission's work with the NSW Ombudsman and the Auditor General on producing guidelines to assist agencies in developing internal reporting systems, the first of which was published in February 1995. The annual report also notes that the ICAC was monitoring the legislation's effectiveness and would make a submission on any identified shortcomings to the 12 month review of the Act by a parliamentary committee (ICAC Annual Report 1994-95:10-11).

In its annual reports for 2002-03 and 2003-04 the ICAC primarily reports on protected disclosures in general sections of the reports about assessing complaints. It provides details of the number of protected disclosures received, the number of allegations made and the number of agencies involved. In 2002-03 ICAC received 213 protected disclosures (ICAC Annual Report 2002-03:21) and 306 in 2003-04, an increase of about 44 per cent (ICAC Annual Report 2003-04:19).

Where disclosures do not meet the criteria used by ICAC to determine whether they are protected under the Act, these matters are reported on as Section 10 complaints, those made by anyone about any matter that concerns or may concern corrupt conduct (ICAC Annual Report 2003-04:20). No information is provided on how many people sought to make protected disclosures which were subsequently determined not to be protected, nor the reasons why the disclosure was not protected.

Additional information is provided on the activities that disclosures concerned. In both years the five main categories of alleged wrongdoing were staff matters, use of public resources, purchase of goods and services, building and development applications/rezoning and law enforcement (see for example ICAC Annual Report 2002-03:21). Four cases studies in the 2002-03 report (2002-03:27,28,51,54) describe the investigation of protected disclosures and/or the need for agencies to improve their internal reporting procedures.

The 2003-04 report refers to work done to improve ICAC's own policies and procedures '*to ensure that the rights and special needs of persons making protected disclosures are observed'*, improvements aimed at ensuring the consent of reporters prior to action that might reveal their identity. Where this is not possible however the ICAC is able to make whatever inquiries it chooses, though the report states that this rarely happens given '*the potential for adverse impact against the complainants*' (ICAC Annual Report 2003-04:24-25).

The case studies included in the reports focus on ICAC's work in strengthening corruption resistant systems and none of them include information about how well the protections available under the Act worked for the whistleblower, or any other information about the implementation of the Act.

### *Corruption and Crime Commission (CCC) – Western Australia*

The Western Australian Corruption and Crime Commission was established on 1 January 2004, the legislation having passed through parliament in 2003, the same year as the *Public Interest Disclosures Act*. The Commissioner's foreword to his first annual report notes that prosecution and disciplinary action are not the Commission's only function, and that its corruption prevention and education function:

> *...fulfils an important part of the Act that states that the main purposes of the Corruption and Crime Commission are "to improve continuously the integrity of the public sector and reduce the incidence of misconduct in, the public sector".* (CCC Annual Report 2003-04:1)

This annual report sets out its relationships with 'stakeholders', who include '*Whistleblowers and internal informants*'. The section refers to the Government requirement for '*a public sector environment that is open and accountable and in which employees and others feel safe to make disclosures that are in the public interest*' (CCC Annual Report 2003-04:4). Oddly though, the only reference to penalties for those who '*cause disadvantage or detriment to any person who has helped the Commission*' is to the provisions of the *Corruption and Crime Commission Act 2003*, not to the *Public Interest Disclosures Act*.

The only reference to the *Public Interest Disclosures Act*, its provisions and operation is in a section entitled '*Compliance*', where the slight information that is provided is

contextualised as satisfying '*the reporting requirements of the Public Interest Disclosure Act 2003, s.23(1)(f)*' (CCC Annual Report 2003-04:34). It first refers to the designation of a person to receive internal complaints and the publication of internal procedures – and its compliance with these requirements. It also notes that no internal public interest disclosures (PIDs) were made about the CCC itself.

The annual report of 2004-05 notes that five PIDs were made to the commission and that information about these disclosures had been provided to the Commissioner for Public Sector Standards in compliance with the Act (CCC Annual Report 2004-05:48). No mention is made of any investigation of these disclosures. These reports provide very little information on the effectiveness or otherwise of the new PID legislation.

Compared with the corruption commissions in the other States, the CCC provided little useful or interesting information in its annual report.

## Corruption/crime commissions: websites

### *Crime and Misconduct Commission (CMC) – Queensland*

The home page of the CMC website has a link entitled '*Lodge a Complaint with the CMC*' (CMC website). The general information accessed via this link does not mention whistleblower complaints or protections, and neither do any of the further links to sections on who can complain, how to complain or what happens when the complaint is made. The link entitled '*Witness Protection*', which suggests it might include whistleblowers, refers to formal witness protection programs that include relocation and so forth. Information for potential whistleblowers, and for those managers and supervisors who might deal with a whistleblowing matter, is strangely available under a link entitled '*Building capacity to deal with misconduct*' (CMC website). There is no intuitive or well sign-posted path to this website information and so it cannot be said to serve as an encouragement to potential whistleblowers. The fact sheets themselves, however, do contain useful information.

### *Independent Commission Against Corruption (ICAC) – New South Wales*

There is reasonable information on ICAC's website on making a protected disclosure, available protections and contacts for further advice (ICAC website) but there is no

obvious link on the front page. Under a general link 'Reporting Corruption', there is a link to 'Making a protected disclosure' which offers general information and further links to 'Protections available under the Protected Disclosure Act', 'How to make a protected disclosure' and 'Need further advice'. The information on protections is very basic and emphasises 'confidentiality' as being one of the main protections available. Protection against detrimental action simply lists a number of examples of reprisals and states that reprisals are an offence. No advice is offered about what a whistleblower might do if they were subjected to reprisals. The information on how to make a disclosure covers all the relevant legislative provisions. A form to be used for reporting to ICAC is attached. 'Need further advice' gives no additional contact details for the ICAC but rather refers potential whistleblowers to the NSW Ombudsman for advice and provides links to a 'protected disclosures poster and postcards' (ICAC website).

### *Corruption and Crime Commission (CCC) – Western Australia*

The '*Reporting misconduct'* section of the Commission's website notes: '*There are heavy penalties for victimising or harassing people who make reports to the Corruption and Crime Commission*' (CCC website). It gives no specific information about whistleblowing or the provisions of the PID Act. The Act is listed in 'Legislation and links' but the link goes only to the State Law Publisher website where a copy of the Act can be obtained (CCC website). There is no obvious link to policies and procedures covering the making of a public interest disclosure and the complaint form which can be downloaded includes no opportunity to identify as a whistleblower (CCC website).

Unlike other websites of 'proper authorities' in Western Australia, that of the CCC does not include a link which refers potential whistleblowers to the Commissioner of Public Sector Standards and the information for whistleblowers on that site.

## Analysis of the quality of information provided by Corruption/Crime Commissions

The CCC stands out in this review of corruption commissions for its lack of focus on the opportunities offered by whistleblower protection for increased scrutiny of misconduct and corruption in the public sector. The minimal information in its annual reports, and in particular, the absence of any advice on the CCC website about legal

protections does not give any sense that the whistleblowers would be encouraged or supported to report to this agency.

The CMC and the ICAC provide reasonable details about the use they have made of protected disclosures in addressing criminal and corruption issues and a potential reporter might well be reassured that the wrongdoing they are reporting will receive appropriate attention. What is much less certain is what action these agencies might take to protect or support a reporter, with the only relevant mention being the CMC's reporting that it had not verified any complaints of reprisals (see table 4.4 above).

## Auditors General

The summarised details of the assessment of annual reports and websites of the Auditors General in each State are provided in table 4.5 below. Immediately obvious is the very basic quality and quantity of information they make available.

In New South Wales the *Protected Disclosures Act 1994* was amended in 2001 to make the Director-General of the Department of Local Government (DLG) an 'investigating authority' for protected disclosures about serious and substantial waste in local government. This amendment was necessary because in New South Wales the Auditor General has no jurisdiction over local government and so could not act on protected disclosures about this level of government. The reports and website of the department are included in this analysis as a sub-section of auditors general because of this role.

**Table 4.5: The adequacy of information published by Auditors General**

| | **Auditors General** | | | |
|---|---|---|---|---|
| State/agency | Queensland | New South Wales | | Western Australia |
| | | AO | DLG | |
| Annual reports | 1 | 1 | 1 | 1 |
| Website | 1 | 1 | 1 | 2 |

**Key:** 1 = 'none/minimal'; 2 = 'adequate/reasonable'; 3 = 'very informative'

## Auditors General: annual reports

### *Queensland Audit Office (QAO)*

The annual report of 1994-95 was not readily available so it has not been possible to include an assessment of information about the office's initial response to its new responsibilities.

In its 2002-03 annual report, the QAO only refers to whistleblowers in Appendix B – '*Compliance Matters'*. The introductory statement sets out the principal objective of the *Whistleblowers Protection Act 1994*:

> *...to promote the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector, danger to public health or safety or danger to the environment.*

It also reports that during the year the agency received a number of inquiries about its Whistleblower Policy and five disclosures relating to instances of suspected improper management affecting public funds in Queensland public sector entities. No information is provided about whether these disclosures were verified or not, or how the QAO dealt with them (Queensland Audit Office Annual Report 2002-03:73).

The report on whistleblowers in the annual report of 2003-04 is in a section entitled '*Our social and environmental contribution - QAO, a good corporate citizen*' and is detailed under a sub-section on '*Referrals*'. It refers first to its own policy:

> *Our Whistleblowers policy establishes procedures for*
> - *persons outside QAO wishing to make a public interest disclosure to the Auditor-General in accordance with the Act; and*
> - *the receipt, assessment and management of a public interest disclosure by QAO.*

The report then tabulates what it calls 'referrals' which appear to be complaints or disclosures made by a range of people categorised as 'whistleblower', 'other', 'general public', 'members of Parliament/Councillors' and 'Crime and Misconduct Commission'. Four matters were referred by whistleblowers, two of which had been finalised with allegations being 'not substantially verified' and two were still in progress at the time of reporting (QAO Annual Report 2003-04:76).

These annual reports do not indicate that the QAO saw much value in reporting on its role in implementing the whistleblower legislation, except to emphasise its own compliance with requirements.

### *NSW Auditor General*

The Auditor General's report for 1994-95 is not readily available so details about the office's initial response to its new responsibilities are not available.

Basic statistical information on protected disclosures is included in the Audit Office annual reports for 2002-03 and 2003-04 as show in table 4.6 below.

**Table 4.6: Protected disclosures made to the NSW Auditor General 2002-04**

| Reporting year | 2002-2003 | 2003-2004 |
|---|---|---|
| Allegations received | 26 | 15 |
| Assessed as protected disclosures | 21 | 13 |
| Agencies affected | 21 | 11 |
| Disclosures processed, including those from previous years | 28 | 23 |

**Source:** The Audit Office of NSW Annual Report 2002-03:24, 2003-04:37

The outcome of disclosures made to the Audit Office in these two years is summarised in the 2003-04 report as follows:

> *Allegations received and processed were in line with the trends of recent years. As in 2002-03, none of the 23 allegations finalised this year had sufficient evidence to conclude serious or substantial waste, nor were they significant enough to warrant a separate report to Parliament. Most allegations involved relatively local matters. When confidentiality is not compromised the Office advises management so they can improve their processes and controls.* (NSW Audit Office Annual Report 2003-04:37)

Nothing is said of what happens if confidentiality might be an issue, or about referrals made to other agencies. The roles of the NSW Ombudsman and the ICAC are referred to, but no explanation of the more pertinent role of the Department of Local Government in receiving protected disclosures about serious and substantial waste in local government agencies/councils (see below).

The annual report of 2002-03 refers to a report to Parliament made by the Auditor General in March 2003 entitled, '*Investigations under the Protected Disclosures Act 1994*' (NSW Audit Office Annual Report 2002-03:24). The foreword to the report explains that initially the Auditor General was only able to conduct performance audits of protected disclosure allegations – a much broader and more expensive option than a investigation of specific allegations. Changes to the *Public Finance and Audit Act 1983* in 2001 had given the Auditor General greater flexibility in how to examine and report on this type of complaint. Following the legislative amendment, reports could simply include the allegations, the action taken by the Auditor General's office, findings and opinion, and a response from whoever the report was made to (agency head, relevant minister or the Treasurer). The report to Parliament focuses on the allegations made, their investigation and the outcome (no substantial misuse of funding or resources) but provides no information about the operation of the *Protected Disclosures Act* or the whistleblowers. The report does, however, contain a very useful piece of advice for potential whistleblowers not available anywhere else in the legislation, Audit Office reports or on the website - a definition of what 'serious and substantial waste' might be:

> *In making this assessment, we use both absolute and subjective measures. Any allegation that suggests a waste of $500,000 or more is automatically examined. Where an allegation is less than that, but it relates to a systemic deficiency, we will consider it for an examination.* (NSW Auditor General Report to Parliament 2003:2)

The Auditor General's foreword to the investigation report had flagged his intent to provide Parliament with '*regular, brief reports summarising our investigation, including any lessons that public sector agencies generally might learn from'* (NSW Auditor General Report to Parliament 2003:Foreword). No further reports about the investigation of protected disclosures had been published by April 2008 when this review was conducted.

### *NSW Department of Local Government*

The Department of Local Government (DLG) explains its overall role on its website:

> *We are principally a policy advice and regulatory agency, acting as a central agency for local government, with a key role in managing the relationship between councils and the State Government. We are responsible for the overall legal, management and financial framework for local government.* (NSW DLG website)

The 2001-02 annual report sets out the DLG's new role and clarifies its primary responsibilities as including:

- *Investigating protected disclosures referred to the DLG by staff or councillors, or by the ICAC or the Ombudsman*
- *Dealing with disclosures made directly to the department*
- *Being the appropriate organisation to contact in the case of reprisals*
- *Advising and educating councils in relation to the Act and facilitating its implementation*
- *Participating in formal training for council officers and councillors*
- *Membership of the Protected Disclosures Steering Committee.* (DLG Annual Report 2001-02:46)

Neither the 2002-03 or 2003-04 annual reports give any information about the implementation of the Act, the most information in both reports being about the department's participation in the Protected Disclosures Act Implementation Steering Committee and its training and advisory functions. The number of protected disclosures received is not reported, let alone any investigative action taken in response or reports of reprisals.

### *Office of the Auditor General for Western Australia*

Apart from the *Public Interest Disclosures Act* being listed under '*Legislation Impacting on Office Activities*' (WA Office of the Auditor General Annual Report 2003:79), the Office of the Auditor General refers to its new responsibility only in the following terms, under a heading '*Significant Issues and Trends 2002-03*':

> *The introduction of 'whistleblower' legislation (Public Interest Disclosure Bill 2003) may create a significant increase in the workload associated with the handling of public queries.* (WA Office of the Auditor General Annual Report 2003-04:18)

The annual report for 2003-04 reports only as follows:

> *Additional work for the Office arose from the passing of the Public Interest Disclosures Act 2003. Four such disclosures were registered in 2003-04. At the time of this report, investigations on two were almost complete, a third was about to commence whilst the fourth could not be investigated on legal advice. In total over 750 hours were spent on*

> *public interest disclosure work.* (WA Office of the Auditor General Annual Report 2003-04:26)

Little in these annual reports gives any idea of how well the legislation was working in terms of encouraging whistleblowers to use the protections of the Act, or how their disclosures were used to improve accountability, focusing as they do only on the increased workload of the Office.

## Auditors General: websites

### *Queensland Audit Office (QAO)*

There is little information for a prospective whistleblower on the QAO website. There are no clearly indicated guidelines or advice pages. A search using the QAO's own search tool reveals that the only reference to whistleblowers is in the *Frequently Asked Questions* in the following question '*What protection do I have if I do refer a matter for investigation?*' The answer provides very little useful information:

> *Also the Whistleblowers Protection Act 1994 states that if a person gains confidential information because of the person's involvement as a public officer in this Act's administration, the person must not make a record of the information, or intentionally or recklessly disclose the information to anyone, except when authorised to do so by the Act.*
>
> *QAO's Whistleblower Liaison Officer maintains all information referred on confidential files in a secure environment.* (QAO website)

The general information on the QAO website states:

> *Any significant issues we identify are made public through the Auditor General's Reports to Parliament, which are our primary communications to Parliament and the Queensland community.* (QAO website)

In the context of this statement, it can only be concluded that whistleblowing is not considered a significant issue by the QAO since its annual reports provide no details about what types of matters were referred by whistleblowers, how they were assessed or what the outcomes were. Neither are there any comments about the operation of the legislation. Few clues are given to potential whistleblowers about how their disclosures would be received or dealt with and nothing is mentioned about the availability of legislated protections.

### *NSW Auditor General*

On the webpage entitled '*Our role'*, information about the whole *Protected Disclosures Act* is summarised as follows:

> *The Office examines allegations of serious and substantial waste of public money under the Protected Disclosures Act 1994. This Act protects public officers ['whistleblowers'] when they identify maladministration, corruption, or serious and substantial waste. We assess any allegations of waste in public authorities other than local governments. The NSW Ombudsman examines maladministration, and the Independent Commission Against Corruption investigates corruption.* (NSW Audit Office website)

The webpage information provided by the NSW Audit Office is very basic, offering no insight into what matters might be taken up by the office, or who to contact. Given that the annual reports state that no disclosures were received which indicated serious and substantial waste, it would seem useful to provide some guide to the threshold used by the Office in its assessment of matters. This information is only available in the 2003 report to Parliament, which is available on the website (NSW Audit Office website). The other piece of essential, but missing, advice is an explanation of why local government is excluded from the office's jurisdiction, and who a potential whistleblower might approach should they wish to make a disclosure about a local government authority.

### *NSW Department of Local Government*

There is no advice or information on the home page of the website for those wishing to make protected disclosures. A search of the website using its own search engine reveals, in a great list of seemingly unrelated documents, a brochure entitled '*Thinking about blowing the whistle?*' which provides extensive and detailed advice on sensible action, levels of evidence and who to approach. It does not include any advice about what 'serious and substantial waste' might mean. Although this brochure is useful, its poor accessibility limits this usefulness.

### *Office of the Auditor General for Western Australia*

Information for potential whistleblowers is found on the '*Contact Us*' page of the website, in a paragraph entitled '*Complaints about Misconduct or Misuse of Public Resources*'. It states:

> *There are protections for Whistleblowers under the Public Interest Disclosure Act 2003 (WA). Making a Public Interest Disclosure is a serious matter and needs to be fully considered beforehand.*
>
> *All government agencies have designated officers to manage Public Interest Disclosures. These officers may be the most appropriate person to contact in the first instance. The Office of the Auditor General is the appropriate authority to receive Public Interest Disclosures that relate to substantial unauthorised or irregular use of, or substantial mismanagement of, public resources. For other kinds of disclosures, the OAG may not be the correct authority. More information about making a Public Interest Disclosure is available for download from the Office of the Public Sector Standards Commissioner's website – click here for access.*
>
> *If, after considering this information, you are considering making a Public Interest Disclosure to the Auditor General, phone (08) 9222 7500 and ask to speak to a Public Interest Disclosure Officer about the procedure for the lodging of Disclosures. To meet the confidentiality requirements of the legislation, Public Interest Disclosures should not be sent by email or fax.* (WA Office of the Auditor General website)

This is sufficient information on how to get advice about proceeding with a protected disclosure. Like those of all agencies in Western Australia, apart from the Crime and Corruption Commission, the website provides a link to the Office of Public Sector Standards which has responsibilities for developing model procedures and central reporting of protected disclosures.

## Analysis of the quality of information provided by Auditors General

The quality and quantity of information in Auditor General's annual reports and on their websites is generally extremely basic. Only the website of the WA Auditor General provides anything more than statistical information about the numbers of disclosures received about serious and substantial waste of public resources. The NSW Audit Office's website has a link to the Auditor General's report to Parliament on '*Investigations under the Protected Disclosures Act*' but this report provides no

information specific to the operation of the *Protected Disclosures Act*. The absence of any information on this website about the specific role of the NSW Department of Local Government as an 'investigating authority' is a significant gap.

Overall there is nothing in annual reports or on Auditor Generals' websites to indicate that any of these agencies have specified roles under the whistleblower protection legislation in their State, let alone that they consider whistleblowing as a useful mechanism for improving public administration.

## Public Service Commissions

The Office of the Public Service Merit and Equity (OPSME) in Queensland was abolished in 2008 and replaced by the Public Service Commission. It is the previous office that is relevant to the time frame of this analysis but it was not possible to access that agency's website as it has been archived and is not publicly accessible. Neither is the 1994-95 annual report readily available.

**Table 4.7: The adequacy of information published by Public Service Commissions**

| | Public Service Commissions | |
|---|---|---|
| **State/agency** | **Queensland**<br>**Office of Public Service Merit and Equity** | **Western Australia**<br>**Office of the Public Sector Standards Commissioner** |
| Annual reports | 1 | 3 |
| Website | n/a | 3 |

**Key:** 1 = 'none/minimal'; 2 = 'adequate/reasonable'; 3 = 'very informative'; n/a = not accessible

### Public Service Commissions: annual reports

#### *Office of the Public Service Commissioner (Queensland)*

The Public Service Commissioner in Queensland operated from the Office of Public Service Merit and Equity (OPSME). The role of the OPSME was described as follows:

> *The role of the OPSME is to assist the Premier in assessing the overall effectiveness, efficiency and management of the Queensland Public Service by leading its development in the areas of organisational and executive capability and performance, public service reform and governance.* (Public Service Commissioner's Annual Report 2002–03:6)

The OPSME was an 'appropriate entity' for the purposes of the Whistleblowers Protection Act (Public Service Commissioner's Annual Report 2002–03:12). Nowhere, however, is it made clear what type of allegations might be appropriately disclosed to the OPSME.

The annual report of 2002-03 reports that OPSME received two public interest disclosures which were referred to appropriate entities for investigation and resolution; these entities are not named. One disclosure was 'not substantially verified' and the other had not been finalised by the time of the report. The report states that a disclosure received the previous year was finalised during 2002-03 but no details are provided (Public Service Commissioner's Annual Report 2002–03:12).

The OPSME reported in 2003-04 that no public interest disclosures had been received that year and none were substantially verified (Public Service Commissioner's Annual Report 2003–04:12). No particular mention is made of the disclosure that had not been finalised the previous year so it is assumed it was not substantially verified.

Each report includes information on the OPSME's role in providing expert advice to government and agencies on ethical behaviour and conduct as they relate to the public sector workforce. This includes advice based on the provisions of the *Public Sector Ethics Act 1994* and the *Whistleblowers Protection Act 1994*. Information is also provided about OPSME facilitating the Queensland Public Sector Ethics Network (QPSEN), a forum aimed at raising awareness and educating public officials about public sector ethics. Each Queensland government department was represented on the network, with leading academics in the field also being invited to participate in meetings (Public Service Commissioner's Annual Reports 2002-03:8 & 23-24, and 2003-04:8 & 23-24).

Reporting on these activities was far more prominent in the agency's annual reports than anything about the contribution of whistleblowing to improving ethical behaviour.

### *Commissioner for Public Sector Standards (Western Australia)*

The statutory roles of the Commissioner for Public Sector Standards[6] were in relation to establishing public sector standards in human resources management, establishing a sector-wide code of ethics and assisting agencies to develop codes of their own and comply with the human resource principles set out in the enabling legislation. Two annual reports by the Commissioner for Public Sector Standards are relevant to this analysis: the standard annual report of the Office of the Public Sector Standards Commissioner (OPSSC) and the annual compliance report.

The OPSSC Annual Report 2003-2004 includes a significant amount of information about the role of the OPSSC in relation to public interest disclosures and the work being done to establish the scheme in Western Australia. This work included developing guidelines for use by public sector authorities to support the introduction of the Act, commissioning research '*to establish baseline data on the level of awareness of the provisions of the Act and about the various responsibilities and accountabilities it covers'*, developing a communications strategy and establishing networks of contact officers to enhance understanding of the Act (OPSSC Annual Report 2003-04:7). It also reported dealing with '*numerous enquiries'* about the legislation, both from public authorities implementing the Act and people wishing to make disclosures either to the OPSSC or to another proper authority (OPSSC Annual Report 2003-04:33).

The OPSSC was given the additional responsibility in Western Australia of monitoring compliance with the PID Act. To this end, it established a Public Interest Disclosure (PID) Register '*to enable PID Officers within public authorities to report to the Commissioner on the number of public interest disclosures received, the results of investigations conducted as a result of the disclosures, and the action taken, if any, as a result of each investigation'*. The annual report states that this information, plus reports on authorities' compliance with the requirement to have internal procedures, would be included in forthcoming compliance reports (OPSSC Annual Report 2003-04:33).

[6] The OPSSC was abolished in December 2010 when the establishment of the office of an independent Public Sector Commissioner, amalgamated the role of the Minister with responsibility for public sector management with the role of the Commissioner for Public Sector Standards (OPSSC website)

The ‘Annual Compliance Report for 2004’ was the Commissioner’s first reporting on her obligations and compliance by public authorities with the *Public Interest Disclosure Act 2003* (the PID Act). The Commissioner’s overview notes:

> *The legislation provides a further crucial and very public part of the ethical framework for better governance by public authorities. The rationale for the legislation is clear. It is about eliminating improper and unlawful conduct, substantial mismanagement of public resources and substantial risks to the environment, public health and safety.*

And further:

> *With the introduction of the PID Act, Western Australia has in place all the elements of an effective integrity system. My role in monitoring compliance with this legislation, and reporting to Parliament also creates improved transparency in the integrity system.* (OPSSC Annual Compliance Report 2004:5)

The report includes information that 26 people made disclosures to proper authorities and provides some general information about the substance of the disclosures. No complaints of victimisation or reprisal were made (OPSSC Annual Compliance Report 2004:25) although the OPSSC dealt with 250 enquiries about ‘PID related matters’ (OPSSC Annual Compliance Report 2004:18). The report also states:

> *Several issues have been identified with respect to the practical application of the PID Act which may need to be addressed through legislative amendments prior to a full review of the PID Act, which is to occur after 1 July 2006.* (OPSSC Annual Compliance Report 2004:10)

In the years following this report, the Commissioner’s annual compliance report was divided into two parts – one dealing with compliance with the *Public Sector Management Act* and one reporting in detail on the operation of the *Public Interest Disclosures Act* (PID). While the information is therefore outside the time frame of this analysis, it is worth noting that the reports on the operation of the PID Act provide substantial information, not only about the numbers of public interest disclosures made, but also the numbers investigated, substantiated and reported back on, including action taken by both agencies and named proper authorities (see, for example, OPSSC Annual Compliance Report 2005:12-16). This reporting gives a quite comprehensive view of the use of the legislation.

### Public Service Commissions: websites

#### *Office of the Public Sector Standards Commissioner*

Extensive information is available on the OPSSC website, with a clear link on the front page entitled '*Public Interest Disclosures*'. The information provided includes advice for whistleblowers about making a disclosure, for public authorities receiving a disclosure and the role of the OPSCC (OPSSC website).

### Analysis of the quality of information provided by Public Service Commissions

The OPSME annual reports provide very basic information about disclosures it dealt with, but the absence of any information about what in fact might be appropriately disclosed to this agency and how it would deal with such disclosures seems to indicate a lack of real interest in the operation of the legislation and its role in utilising protected disclosures to improve the ethical culture of the Queensland public service.

The OPSSC provides a wealth of readily accessible detail about the implementation and operation of the *Public Interest Disclosure Act* in Western Australia on both its website and in its reports. This information is aimed at those managing disclosures as well as those making them. It is also quite explicit about the role of the OPSSC itself. Its efforts fulfil not only its legislated functions, but also address the concerns raised during the debate in Parliament about the need for more than statistical reporting of disclosures received.

## Conclusions

The aim of this detailed analysis of the annual reports and websites of the main accountability agencies with responsibilities for disclosures by whistleblowers has been to assess how these agencies have implemented their responsibilities under the relevant Acts, with particular attention being paid to analysing the information they made available about their roles and the work they undertook. This analysis is premised on an understanding that there is a two-fold purpose in making this information available: (i) reporting to parliaments on the success or otherwise of whistleblower schemes and (ii) encouraging potential whistleblowers to come forward with evidence of wrongdoing in order that it could be investigated and remediated. Both activities are related to

accountability – that of accountability agencies to their parliaments, and then in institutionalising the whistleblower schemes which are aimed at encouraging the reporting of wrongdoing in order to improve accountability in the public sector.

The review reveals that accountability agencies comply with the basic requirement of annual reporting to parliaments by providing information about the numbers of disclosures received during the year. This information is sometimes buried in general sections on complaints received and of itself gives no idea about the implementation of the whistleblower scheme and the extent of its success in achieving improved accountability in the public sector. Other agencies provide more information about the types of wrongdoing reported and outcomes, with some also including case studies of specific disclosures but, with the exception of the NSW Ombudsman's reporting of its attempts to resolve reprisal action against a whistleblower, these case studies focus on the wrongdoing and not on the whistleblower (NSW Ombudsman Annual Report 2003-04:105). A very few include significant discussion in their reports about the operation of the legislation, its limitations and the need for amendments. Only these few agencies provide the kind of information parliamentarians in Western Australia and Queensland indicated was necessary.

Given the emphasis placed by parliamentarians on the role of accountability agencies during debate on the development of whistleblower protection legislation, it is extraordinary that some of the agencies' websites provide no information about the agency's role in relation to whistleblowers. Many of them provide only brief summaries of the legislation and information about their basic legislated functions. In all States at least one agency provides fairly detailed advice on reporting procedures and information brochures are available from these websites. Reflecting the weakness in departmental procedures reported on by Roberts (2008:248), accountability agencies pay very little attention to explaining mechanisms for the protection or support of whistleblowers, even when they have specifically legislated responsibility for investigating allegations of reprisal action against individual whistleblowers. None of the accountability agencies provide any advice about when it might be appropriate or useful for a whistleblower to make their disclosure externally rather than using internal departmental procedures.

No statistical correlation between the extent and quality of information provided in annual reports and on websites of external accountability agencies is possible because the information is too patchy. The overall patterns are nonetheless clear. Table 4.8 below compiles the individual tables from the review above and inserts the numbers of disclosures made to each agency in the years 2002-04.

As a group, the auditors general provide the least informative and useful information, either in annual reports or on their websites, with the Western Australian Auditor General being the only agency which provides useful and usable information to potential whistleblowers. Only in New South Wales do whistleblowers appear to have any confidence in approaching this type of agency.

The OPSSC in Western Australia and the NSW Ombudsman were the only agencies where the published information, both in annual reports and on websites, was assessed as being 'very informative'. They were not, however, the agencies in receipt of the most disclosures. Clearly other factors, including presumably the kind of wrongdoing being disclosed, influence the choice of reporting path.

**Table 4.8: Assessment of information published by accountability agencies and numbers of disclosures received**

| | Ombudsmen | | | Corruption/crime commissions | | | Auditors General (NSW DLG) | | | Public Service Commissions | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **State** | **Qld** | **NSW** | **WA** | **Qld** | **NSW** | **WA** | **Qld** | **NSW** | **WA** | **Qld** | **WA** |
| Annual reports | 1 | 3 | 1 | 2 | 2 | 1 | 1 | 1 (1) | 1 | 1 | 3 |
| Website | 2 | 2 | 1 | 2 | 2 | 1 | 1 | 1 (1) | 2 | n/a | 3 |
| Disclosures received during 2002-04 | 2 | 180 | 2* | 845 | 519 | 5 | 9 | 34 (0) | 4 | 2 | 0 |

**Key:** 1 = 'none/minimal'; 2 = 'adequate/reasonable'; 3 = 'very informative'; n/a = not accessible

* The WA Ombudsman reported 'a small number' of disclosures and referred specifically only to two; this number is probably an underestimate but no more accurate figure is available

By far the most utilised external reporting path is to corruption/crime commissions, except again in Western Australia. The ICAC in New South Wales received the most

number of disclosures in the two-year period followed by the CMC in Queensland. The quality and quantity of information provided on their websites was only assessed as being 'adequate/reasonable' so there is no obvious correlation between public knowledge about an agency based on this type of information (as opposed to media reports for example) and its use by whistleblowers.

These observations appear to somewhat undermine the concept that trust of an organisation is based on an understanding of its role and purpose and its reliability and reputation (see discussion above). Certainly the 'formal' information published by these agencies does not seem to be a sufficient basis for trusting them. The analysis of empirical data in Chapter 2 about when, what and to whom whistleblowers choose to report provides some answers to questions about their use of external accountability agencies.

# Chapter 5 Reporting wrongdoing

> What we think, or what we know, or what we believe is, in the end, of little consequence. The only consequence is what we do. (John Ruskin)

## Introduction

Calland and Dehn write that '*whistleblowing matters to all organisations and all people. This is because every business and public body faces the risk that something it does will go seriously wrong'* (Calland and Dehn 2004:2). The WWTW research demonstrates the truth of this statement. One of the findings of its Employee Survey were that 71 per cent of the more than 7,500 thousand respondents from 118 public sector departments across four jurisdictions in Australia had witnessed at least one incident of wrongdoing in their organisation in a two-year period. Sixty-one per cent of the respondents believed the wrongdoing they had witnessed was at least 'somewhat serious' but, despite the existence of whistleblower protection legislation and procedures, only 28 per cent had reported the wrongdoing they considered the most serious (WWTW 2008:xxiii).

Understanding what encourages employees to report wrongdoing, or inhibits them, is clearly essential in an evaluation of the role of external accountability agencies in achieving the objectives of whistleblower legislation. Of particular relevance to the analysis in this chapter is the first objective: facilitating the making of disclosures. Taking into account theoretical concepts already explored in this thesis and the analysis of both legislation and information published by external accountability agencies, this chapter will examine the reasons why whistleblowers choose to report and how they go about doing so. Their preference for reporting internally will be established and then contrasted with the decisions to report to external accountability agencies. The empirical data clearly indicates that some individuals, even when their experience of whistleblowing has been very difficult, declare that if they witnessed further wrongdoing they would report again. Most do, however, state that they would approach

reporting again in a different way. The reasons behind their ongoing commitment to disclosing wrongdoing, and for choosing a different path are also analysed.

The argument in this chapter is three-fold: that whistleblowers disclose wrongdoing out of personal beliefs about integrity and morality; that their primary loyalty is to their employer and that they mostly report wrongdoing in order to have it stopped; that they only report to external accountability agencies when it becomes clear that no appropriate action will be taken on their reports and their loyalty to, and trust in, the department is breached by the experience of poor treatment and reprisals.

The chapter is structured as follows. Quantitative data and analysis from the WWTW research is used to establish broad patterns of reporting behaviour. Both quantitative and qualitative data are used to analyse in more depth the different aspects of choosing to report, these aspects having become evident from the grounded theory coding of interview material and free text responses to surveys. They are categorised in terms of: (i) reporting wrongdoing, (ii) delaying reporting, (iii) choosing who to report to (within the department), (iv) reporting externally and, (v) reporting again.

## Reporting paths: a quantitative framework

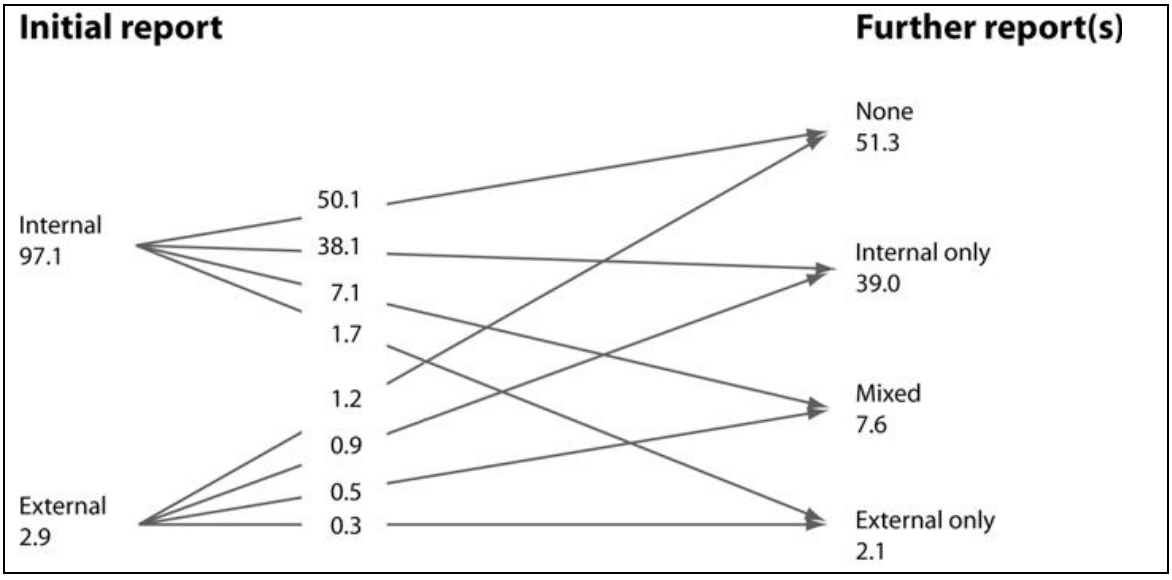
As discussed in detail in Chapter 3, whistleblower protection legislation in each State includes provisions enabling employees to make disclosures to external accountability agencies and be protected against reprisals for reporting in this way. While the importance of individual agencies resolving its own problems was acknowledged in parliamentary debate, in no State does the Act require whistleblowers to report within their own agency before approaching an external accountability agency. These provisions were uncontested features of the proposed legislation in each State, indicating a wide-held belief in the importance of enabling whistleblowers to report externally as easily as they could report internally, and the credibility of the relevant external agencies. Whistleblowers themselves, however, show a marked preference for reporting internally, particularly in the first instance. The WWTW data on patterns of reporting is used to demonstrate this preference empirically.

Donkin, Smith and Brown analyse the patterns of internal and external reporting by public officials using the responses to two WWTW surveys: the Employee Survey

(Q28: 858 respondents) and the Internal Witness Survey (Q30, Q38: 138 respondents). It is worth reiterating at this point that the Employee Survey did not include responses from any previous employees of departments, while the Internal Witness Survey did achieve this because of the involvement of external accountability agencies in the distribution of surveys. This factor may account for some of the higher levels of dissatisfaction and experience of reprisals indicated by respondents to the Internal Witness Survey.

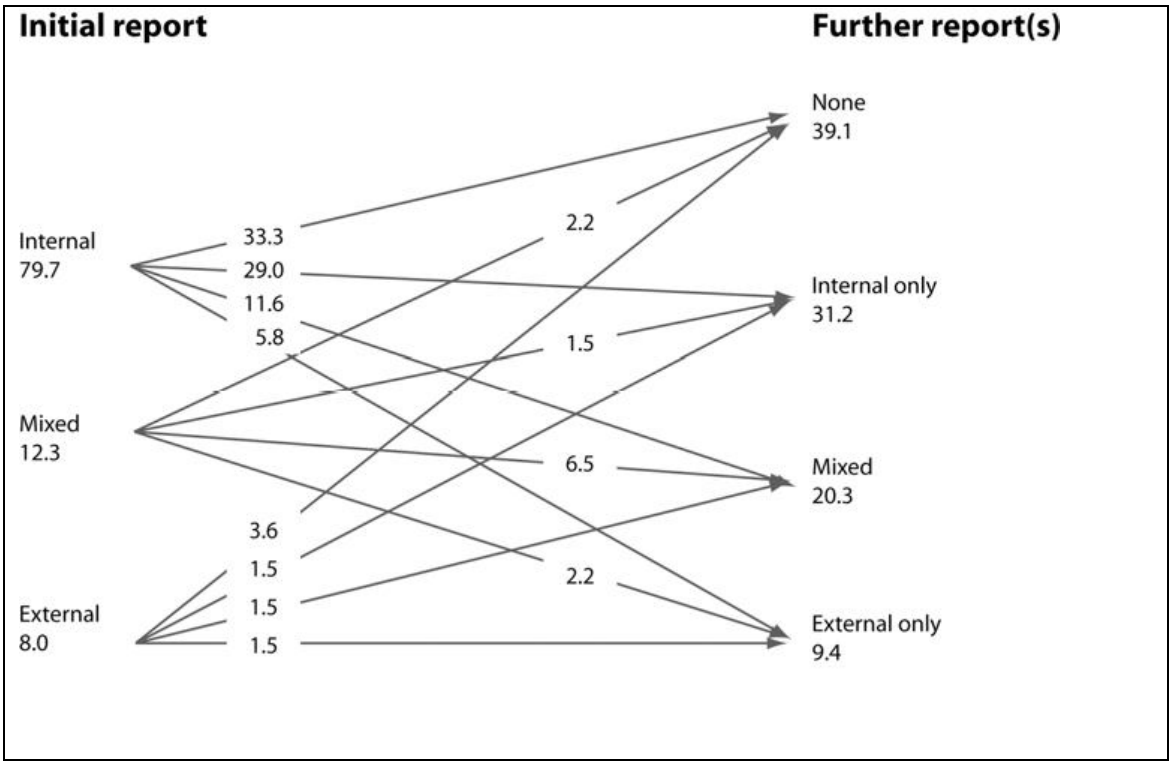
What is revealed by analysis of the responses to both surveys is that whistleblowers often approach more than one type of person to report wrongdoing and nearly all of them indicate a strong preference for reporting within agencies and little use of external accountability agencies. In summary, less than three per cent of respondents to the Employee Survey reported to an external agency initially, and only about ten per cent reported externally at any stage of the process. A higher proportion of respondents to the Internal Witness Survey indicated they had made their initial reports to an external agency, either solely or in combination with an internal report. Nonetheless, nearly 80 per cent made only internal reports initially, and less than a third ever reported externally. Donkin *et al* represent these reporting paths diagrammatically and these figures are reproduced below (Donkin *et al* 2008:90-91).

**Figure 5.1 Reporting paths of public interest whistleblowers: Employee Survey (per cent)**




**Source:** Employee Survey

**Figure 5.2 Reporting paths of public interest whistleblowers, Internal Witness Survey (per cent)**




**Source:** Internal Witness Survey

**Explanatory notes:**

'Internal' includes reports to one of the following: supervisors, senior managers, chief executive officers, internal ethical standards units, internal audit or fraud units, internal ombudsmen or complaints units, human resource or equity and merit units, internal hotlines and counsellors and peer support officers.
'External' includes reports to one of the following: external hotlines or counselling services, unions, government watchdog agencies, members of parliament and journalists.
'Internal only' includes reports made only to one of more recipients in the 'Internal' category. 'External only' includes reports made only to one or more recipients in the 'External' category. 'Mixed' includes reports made to both 'Internal' and 'External' recipients.

The Internal Witness Survey gave respondents a number of options in order that they might identify who they had reported wrongdoing to, either in the first instance or later in their reporting experience. One of these options was 'an external government watchdog or investigation agency' and those who chose this option were asked to identify the specific agency. Not every respondent did so, and some nominated agencies that were not external watchdog agencies, such as legal representatives (11) colleagues (7), unions (3) and workplace safety/insurance agencies (2).

Only six respondents had made their initial disclosure of wrongdoing to an external watchdog agency and all nominated anti-corruption commissions as the agency approached in the first instance (Internal Witness Survey:Q30). When respondents made a further report to an external oversight agency, a broader range of agencies was utilised, and a number of respondents had approached more than one agency. The number of whistleblowers who approached a specified external watchdog agency with a further report was as follows: 14 approached corruption/crime commissions, 13 reported to ombudsmen's offices, seven to public sector commissions, one to an auditor-general and three to agencies with jurisdiction to deal with discrimination complaints.

While none of the whistleblowers who were interviewed had approached an external agency with their initial report, 21 had approached someone externally for assistance at some stage. This included commissions of inquiry, union representatives, lawyers and agencies responsible for workplace safety. Only 11 respondents reported to an external accountability agency at any stage in their reporting experience: eight to corruption/crime commissions, five to ombudsmen and two to public service commissions.

Pertinent here before exploring the reasons for reporting are the findings of the WWTW research about how whistleblowers formed their views that the conduct they had witnessed was wrong.

## Identifying wrongdoing

Wrongdoing is of course identified in a number of different ways and is dealt with in a range of ways by the whistleblowers. While no clear patterns are evident, this part of the process is important because it is relevant to the subsequent choices made by whistleblowers and the totality of their experiences and therefore the analysis of the success of whistleblowing legislation, procedures and the roles of external agencies.

Table 5.1 below shows, legal and personal concepts of right and wrong as well as organisational statements about values and proper conduct were at least very important to about 80 per cent or more of whistleblowers in their identification of wrongdoing.

**Table 5.1 Identifying wrongdoing (Internal Witness Survey)**

| Reason for forming views about reported wrongdoing | Percentage of respondents who nominated this reason as at least 'very serious' |
|---|---|
| Policies of my organisation | 88.7 |
| A code of conduct or code of ethics | 87.4 |
| The law | 85.2 |
| General community ideas about right and wrong | 79.7 |
| Personal ideas about right and wrong | 79.3 |

**Source:** Internal Witness Survey Q7

The findings that organisational policies and ethical codes have such a strong effect on at least this subsection of employees gives empirical support to the theoretical proposition that these instruments are influential on the development of moral agency and are (slightly) more important than compliance with legal definitions or constraints.

In order to demonstrate that whistleblowers are not a rare group of employees with views contrary to the majority or the norm WWTW data is again utilised.

The WWTW researchers analysed employee characteristics using measures of organisational citizenship behaviour, i.e. behaviour which benefits the organisation, such as personal industry, loyalty and individual initiative, in order to discern who was reporting, and particularly whether some individuals are predisposed to blowing the whistle due to identifiable personal characteristics. They found no significant differences between those who reported and those who did not and concluded that depending on the circumstances almost any employee who perceives wrongdoing can be either '*induced or provoked to report it'* (Wortley, Cassematis and Donkin 2008:54). This work contradicts one of the common myths of whistleblowers as being disgruntled troublemakers (as discussed by Smith 2010: 705, Miethe 1999:12-14, Bovens 1998:192-193).

Donkin *et al* analysed the same measures of organisational citizenship behaviour comparing those who reported internally and those who used external reporting paths. They found both groups exhibited high levels of organisational citizenship behaviour with external whistleblowers indicating higher levels of initiative and lower levels of loyalty than those who only ever reported internally. The cause for this latter result is

not evident from the quantitative data, and Donkin *et al* posit that it could be either a predictor of external reporting or a result of the experiences of whistleblowers which led them to report externally. Together with the finding that those who only ever report internally indicate higher levels of trust in management than those who report externally, their further analysis inclines them to the view that trust and loyalty are likely to be diminished as a result of the experience of reporting (Donkin *et al* 2008:84-101). The analysis that follows tends to confirm that trust and loyalty are indeed likely to be diminished as a result of the experience of reporting internally, and that this is significant in the decisions made by some whistleblowers to approach external accountability agencies.

Given the low numbers of whistleblowers in WWTW data set who had reported to external accountability agencies, particularly on their first attempt to report wrongdoing, this thesis analyses the reporting decisions of all whistleblowers in order to tease out influences on those decisions. The analysis then focuses more tightly on decisions to report externally.

## Reasons for reporting

In the Employee Survey, respondents who had reported wrongdoing (n=2155) were asked to rate their reasons for reporting on a four point scale (1= 'not at all important', 2='somewhat important', 3='very important', 4='extremely important'). Internal witnesses (n=242) were also asked about the relative importance of factors in their decision to report wrongdoing although the options offered did not exactly replicate those in the Employee Survey and the rating was on a five point scale (1= 'not at all important', 2='not very important', 3='somewhat important', 4='very important', 5='extremely important').

Table 5.2 shows that personal ethical responsibility, a belief that the wrongdoing was serious enough and that reporting would lead to rectification of the wrongdoing were at least very important reasons for more than 80 per cent of respondents in each of the surveys. Much less important to the respondents were legal responsibilities and protections, although having sufficient evidence and anticipating support from management or the organisation were also cited as important reasons. There were

similar patterns except that knowing who to report to, as well as being able to trust that person, were more important to respondents in the Employee Survey than those in the Internal Witness Survey.

**Table 5.2 Reasons for reporting (percentage)**

| Reason for reporting | Reporters who nominated this reason as at least 'very serious' (Employee Survey) | Reporters who nominated this reason as at least 'very serious' (Internal Witness Survey) |
|---|---|---|
| I saw it as my ethical responsibility | 85.6 | 96.8 |
| The wrongdoing was serious enough | 82.2 | 93.5 |
| I believed my report would correct the problem | 81.5 | 80.7 |
| I had evidence to support my report | 76.8 | 75.8 |
| I knew who to report to | 75.9 | 54.1 |
| I trusted the person I should report to | 75.5 | 52.0 |
| I thought I would be supported by management | 71.1 | 67.7 |
| I believed I was under a legal responsibility | 60.4 | 68.8 |
| I thought I would be supported by co-workers | 59.8 | 50.8 |
| I believed I would have legal protection | 49.5 | 33.6 |

**Source:** Employee survey Q27; Internal Witness Survey Q26

In order to explore in more depth the reasons for reporting, the question of why and how they became involved with reporting wrongdoing was broadly canvassed in interviews with whistleblowers. Interviewees spoke in detail about the situations in which they identified the wrongdoing they reported and from these interviews three main issues became apparent, two of which were not based in ethical or moral decisions. Reporting of wrongdoing was sometimes accidental and some reports were made because the reporter was required to give evidence in some forum or other. For those who did more specifically choose to report, there was often an identifiable moment when they could no longer ignore or tolerate the wrongdoing.

There is perhaps a question as to whether those reporting accidentally or more particularly those required to disclose wrongdoing, can be truly defined as

whistleblowers. Given that their disclosures fall within the definition of whistleblowing adopted in this thesis, they are treated as such. Further, in each case the reporter's disclosures provided opportunities for departments to resolve integrity breaches and they therefore served the purpose of increasing accountability.

## Accidental reporting

From the interviews, it became apparent that, in some cases, differences of opinion or simply questions about apparent anomalies can lead the reporter to identify more serious wrongdoing. Alec, for example, queried an error and while he received no response to this inquiry, he was bullied and harassed by a more senior colleague as a result. The subsequent investigation of this bullying revealed a quite serious fraud on the part of the more senior colleague. Kylie went to the doctor to obtain a medical certificate for work related illness and was given a workers' compensation certificate instead. This resulted in the department investigating the circumstances in which the injury had occurred and some quite negative revelations about the management of the work unit. For Dennis, the identification of wrongdoing was also an unexpected outcome from the investigation of another matter but revealed seriously corrupt activities on the part of a much more senior colleague.

## Being required to give evidence

There are other circumstances where whistleblowers may not be in a position to plan for reporting, particularly where someone is required to give evidence, for example in royal commission hearings or other forums where they are required to answer questions under oath. Despite the legal compulsion to answer questions that might reveal wrongdoing, there are those who nonetheless find themselves in uncomfortable situations. It seems that in some circumstances colleagues, presumably those implicated in the wrongdoing, treat these witnesses as disloyal or dissident.

Scott described complying with a requirement to give evidence during an investigation, and the response of his colleagues:

> *[I'm] a victim of telling the truth…I find I get ostracised a fair bit… I've been seen to come forward when I probably should have toed the party line and said nothing. I was in a dilemma which way to go: do I tell the truth on internal investigation, which the [CEO] wants, or do I tell a lie? If I tell a lie and it proves out later, I'm in trouble.* (Scott)

## Tipping points

For some whistleblowers there is an identifiable tipping point when they feel compelled to report wrongdoing they have become aware of. Consistent with the importance of personal ethical standards to survey respondents (see Table 5.1 above) and the relevance of organisational policies in forming views about standards of conduct, the whistleblowers interviewed spoke both about personal values and organisational standards that required them to take action. This would seem to indicate what Mulgan (2000) and Dubnick (2007) would describe as a sense of responsibility and obligation, and/or the need to bring the alleged wrongdoer to the attention of those within the agency in order for them to be called to account. Whistleblowers' statements about needing to take action in order to be able to live with themselves are also illustrative of Dubnick's central purpose of accountability: fostering responsibility and a sense of moral obligation in those who have a choice about what action to take.

Doug said about his reasons for reporting: *'I just wanted all these people to be accountable'*. He also referred to the need to improve the focus on accountability, developing systems that enabled the early identification of wrong conduct and weak or flawed accountability systems, as well as exposing double standards in how the agency dealt with people. Jordan too was clear that reporting was the right thing to do: '*you can't have supervisors that don't supervise and you can't have officers that aren't trustworthy in the job*'.

Barb expressed the reluctance of many whistleblowers to take action and the internal pressure that requires the person to do something, referring to the length of time it takes for departments to respond and the 'agony' experienced by the whistleblower, not least because of how long it takes, compared with generally slight consequences for the perpetrator.

At the tipping point it becomes a question of whether the whistleblower can continue to work for an organisation that supports wrongdoing, and even more fundamentally whether they can live with themselves if they do not take action. Colin finally took early retirement on health grounds as a result of the stress following his reporting and yet when asked whether the reporting was worth the subsequent sacrifice, Colin's response was:

> *I would have felt pretty bad if I was still in the system now and I just shut up and said nothing and watched it all happen. I could be in a far worse position mentally and physically than what I became.* (Colin)

That there is a tipping point at which whistleblowers can no longer not disclose wrongdoing points to another factor in the decision to report wrongdoing – not all whistleblowers report at the time of first witnessing the conduct they identify as wrong. This was a question canvassed in the Internal Witness Survey and then in the interviews.

## Delaying reporting

Respondents to the Internal Witness Survey were asked about why they might have delayed taking action. They were asked to rate a range of reasons on a five point scale (1= 'not at all important', 2='not very important', 3='somewhat important', 4='very important', 5='extremely important').

Table 5.3 shows that needing to be assured reporting would be worthwhile was at least 'somewhat important' to nearly 80 per cent of respondents. The perception that reporting might be a risky action is evident both from the 74 per cent who explicitly gave this as a reason for delaying, as well as the 71 per cent who were concerned about reprisals and the 70 per cent who indicated their need to trust the person to whom the report should be made.

**Table 5.3: Reasons for delaying reporting (percentages)**

| Reason for delaying reporting | Respondents who nominated this reason for not reporting immediately as being at least 'somewhat important' |
|---|---|
| I did not think that anything would be done about it | 77.2 |
| Reporting it seemed too risky | 74.1 |
| I tried to deal with it informally | 71.4 |
| I was concerned people would take action against me | 70.9 |
| I didn't trust the person I had to report it to | 70.0 |
| I didn't have enough evidence | 58.2 |
| I didn't know who to report it to | 56.2 |
| I tried to deal with it formally, as part of my job | 54.7 |

**Source:** Internal Witness Survey: Q27

Other possible reasons for delaying reporting, which less than 50 per cent of respondents indicated were somewhat important, included not wanting anyone to get into trouble, not knowing whether the wrongdoing was important enough and thinking someone else should be responsible for reporting.

The whistleblowers who were interviewed focussed on only two of these reasons as being relevant to delaying reporting: needing to collect evidence to support the allegation(s) that are to be made, and attempting to resolve the issue directly with the wrongdoer. A further reason, not canvassed in the survey, but revealed in the interviews, was that whistleblowers were sometimes involved in the wrongdoing for a period of time and did not report it until they began to fear for the consequences of their involvement, or their personal ethics made the situation intolerable.

## Collecting sufficient evidence

Table 5.2 shows that whistleblowers considered having enough evidence to support their report as a 'very important' reason for reporting: about 77 per cent of whistleblowers who responded to the Employee Survey and 76 per cent of Internal Witness Survey respondents. Table 5.3 shows that, for nearly 60 per cent of whistleblowers, not having enough evidence was an important reason for delaying reporting. From the interviews, the reasons for the importance of this factor become evident. Whistleblowers decided to collect evidence for a period of time after their first

observation of wrongdoing for two stated reasons: to support the allegations being made, or in some cases to assure themselves that what they thought they had witnessed as wrongdoing was in fact occurring.

For example, despite what might seem to have been a first-hand observation of demonstrably wrong conduct, Paula described this first observation of the manager's actions as '*a bit of a warning sign*' but became clear after the occurrence of a similar incident that the manager's conduct was, without doubt, reportable. On the other hand, Sharon and a colleague collected evidence over a period of three months before taking the formal step of reporting, to be sure that there was a pattern of wrongdoing and that it amounted to serious misconduct – as it turned out, systematic fraud amounting to several thousands of dollars:

> *The secretary of our small department came to me too and said that she felt that the ... manager was stealing. Because she had noticed an increase of articles being ordered through the department's budget, and she was signing for the delivery but they were items that were never or would not be used in this department.*
>
> *I suggested to her that, if possible, could she photocopy the delivery notes and then we could have a look at them and see what they were, how much they were for, and the frequency, which we started to do. And after a month - I can't remember the exact but it was getting up to nearly a thousand dollars of goods.* (Sharon)

## Trying direct resolution

Another significant reason given for delaying formally reporting wrongdoing is that whistleblowers often try to resolve problems directly with the wrongdoer, to give that person an opportunity to remedy the situation. Table 5.3 indicates this, with 71 per cent of whistleblowers attempting an informal resolution of the problem and 55 per cent trying more formal measures but not formally reporting wrongdoing. Although survey respondents were not asked to identify what these measures might have been, extrapolating from the interviews, it seems likely that those taking this course mainly comprised managers with the authority to take disciplinary action, such as warnings or counselling, and perhaps includes those whistleblowers who laid grievances against alleged perpetrators of wrongdoing.

The direct resolution is sometimes done by writing up concerns but those who were interviewed more often approached the perpetrator directly. Whistleblowers who decide to approach the wrongdoer directly seem to be operating within what they perceive to be a moral community of the kind proposed by Dubnick (2004), in that they assume the wrongdoer will take appropriate action and stop, or at least explain, their conduct. However, the response by the alleged perpetrator sometimes indicates different values and no willingness to resolve identified issues. This can leave the reporter with little choice, other than (i) to do nothing further, or (ii) to report to more senior or authoritative officers:

> *He would agree to fix whatever it was we were talking about… and then he would change his mind later… After this sort of thing happening many times, as well as quite a lot of other issues, we contacted [regional office] and made an appointment and saw her and explained the situation.* (Karen)

Even when it became clear that the manager's conduct was not going to change, Karen and a colleague were still uncertain about taking further steps:

> *It was hard to make the decision to actually do it. The number of times we sat down together and said 'will we, won't we?' ... well, where's the point that you get to that you have to? And then one day we said, 'nah this is ridiculous, we've got to do something' and we rang up and made an appointment with the district superintendent. Now we didn't really know if that was the right thing to do… and then it became obvious to us that he was taking leave without applying for it formally, having time off, and I think that was the straw that broke the camel's back and that's when we went in and decided we had to do something.* (Karen)

Adam had also tried to resolve difficulties directly with his manager over a period of about three months. The manager's refusal to take appropriate action led Adam to the next step of reporting to someone with the authority to require action, in this case the head of the internal audit section of the department and ultimately the department head. Adam did not discuss this decision in terms of whether it was the right thing to do or not, but only in terms of being clear about the need to do something to correct the wrongdoing. He was confident that the department head would take appropriate action and, at that point, he was not concerned about potentially negative personal consequences.

## Implicated in wrongdoing

A further situation where whistleblowers delayed reporting, not canvassed in the Internal Witness Survey but discussed by a number of interviewees, is when the whistleblower has either knowingly or unwittingly been involved in or implicated in the wrongdoing he or she decides to report.

Paula, for example, delayed reporting until she had an opportunity to seek advice from the union on whether she needed to report what she had observed. Having been advised that she risked losing her job by not reporting, she did so. This report was not until a week or so after observing conduct that occurred on two occasions, and which was, by her own description, potentially seriously detrimental to a very vulnerable person. Even then, Paula did not report directly to the senior manager who could have taken immediate action to prevent further misconduct by the alleged wrongdoer. Paula was not motivated to report in order to protect the vulnerable person, but rather to avoid disciplinary or legal action for having failed to comply with a legal requirement to report. Paula's case is evidence of the need for a regulatory or compliance based accountability framework when employees do not demonstrate sufficient moral agency to motivate ethical behaviour.

This is not to say that there is always a clear distinction between these motivations for reporting wrongdoing. Those who report to protect themselves from disciplinary action or to avoid being or becoming complicit in wrongdoing indicate both compliance with regulatory or control regimes and, as in Adam's case, a desire to preserve personal standards of ethical conduct.

Jordan was being asked by a supervisor to falsify records to the benefit of the supervisor. Part of his rationale for reporting was not wanting to be a part of any wrongdoing. Frank was also being asked to falsify records, and like Jordan, did so for a short time:

> *...and then I just decided I'm not going to do this anymore. So I said, 'this is wrong, I'm not going to do it'... So they simply found someone else who would sign the forms. Subsequent to that I supplied the department documentation of the falsification of [other] records.* (Frank)

These whistleblowers had both complied with requests from their supervisors but then found that they were unable to continue participating in what they saw as wrongdoing, for fear of being identified as wrongdoers themselves and for personal ethical or moral reasons.

From the analysis above it is clear that whistleblowing is not a simple matter of clearly identifying wrongdoing and reporting to someone with authority to deal with it. There are nuances in the identification process where whistleblowers question their own judgement and seek to support their identification of wrongdoing with evidence. While this can be a painful process, it is also evidence, in at least some cases, of the thoughtfulness which underlies the decision to blow the whistle. In the main, whistleblowers turn to their own departments to report wrongdoing, clearly indicating that their first impulse is to trust more senior officers to resolve the integrity breaches. The issues arising from the choice of reporting path are examined in more detail in the next section.

## Reporting internally

An overwhelming number of accountability agency case-handlers agreed that their agency had formal policies and procedures for the handling of reports (94%), with a majority (88%) also agreeing that these policies gave public employees a reasonable idea about what would happen if they reported wrongdoing to the agency. Nearly 40 per cent, however, believed that the communication of these policies to staff was quite ad hoc.

Accountability agency case-handlers generally considered that it would usually be appropriate for whistleblowers to report to internal audit/fraud/internal investigation/ethics units in their own departments, but rarely a good idea for them to approach their own supervisor or the supervisor of the area reported on. This implies that case-handlers do not really consider those in supervisory positions can be trusted to deal appropriately with the report, and perhaps the reporter. The head of the department was sometimes viewed as an appropriate recipient of reports but, apart from audit type units, an external accountability agency was viewed as the next most appropriate recipient. It is unsurprising that investigative units either within the department or in an

accountability agency are viewed as the most suitable to deal with reports of wrongdoing. The jurisdictional limitations of an external accountability agency do not allow it to investigate all types of wrongdoing and therefore limit its suitability as an avenue of reporting in all instances. However, the relative importance of audit type functions indicates an assumption about the value of independent investigation or oversight rather than ordinary supervisory or management structures.

If there were also certainty among employees about the standards and values of a community, in this case public sector departments, a responsible individual might be expected to have few qualms about reporting wrongdoing, particularly to departmental investigative unit. This however does not seem to be a common experience among the whistleblowers in this study. More frequently, as evidenced by the many whistleblowers who talked about their need to identify someone they could trust to report to, there is a lack of confidence that there will be an appropriate response to the disclosure or the whistleblower. The following analysis of whistleblowers' choices of who to trust and why indicates that trust and trustworthiness have important ramifications for the reporter and the way in which allegations are dealt with.

Academic writing confirms the importance of trust in accountability: 'W*hen high levels of trust exist between leaders and followers, or managers and subordinates ... compliance and commitment become less problematic'* (Kramer 2006:7). Table 5.3 shows two of the top five reasons for delaying reporting were fearing that nothing would be done (77.2%) and trying to deal with the problem informally (71.4%). Both reasons reflect the importance of whistleblowers believing their action in reporting will be worthwhile and trying first to deal with matters themselves. The other three top reasons relate to issues of trust in the organisational response: believing reporting would be too risky (74.1%), fearing reprisals (70.9%) and not trusting the person to whom the report should be made (70.0%).

During the semi-structured interviews, whistleblowers were asked why they chose to report in the way that they did. Mirroring the importance of trust that emerged from the survey data, a major theme in their responses was the importance of deciding who they could trust as an essential part of their decision to report.

## Naivety or misplaced confidence?

Brown and Olsen, in their analysis of the risks of whistleblower mistreatment, refer several times to the naivety of some whistleblowers:

> *It appears that a large proportion of public interest whistleblowers fall into the 'trusting whistleblower' category, with many also probably quite naïve – for no fault of their own – about the processes involved.* (Brown and Olsen 2008:141)

> *The nature of the process dictates that many whistleblowers will be trusting or somewhat naïve about the risks of mistreatment, because otherwise they will be more likely to follow a risk-avoidance path and simply not report.* (Brown and Olsen 2008:144)

The basis of this attribution of naivety is partly the evidence that even when there is much at stake, whistleblowers are quite strongly inclined to report initially to their managers/supervisors in the expectation that proper processes will ensue. Overall, the interviews with whistleblowers do not indicate unquestioning trust or naivety but rather an expectation that departmental policies and procedures would be followed. Frank, for example, wrote a report about issues he had identified. His report went to the director of the workplace unit:

> *According to policy she should have then referred that to [a corruption commission] and it should have been a protected disclosure. She didn't follow process.* (Frank)

As Angela also stated:

> *I didn't seek any external advice because I truly believed at the time of making the complaint … the [wrongdoers] would be dealt with in the correct manner. I was surprised that it wasn't then.* (Angela)

Nearly all the whistleblowers seemed to be aware that there would be ramifications from reporting – they were not naïve about the consequences of such an activity. As Anna stated during her interview:

> *I didn't see that there would be any way that I could be paid back, apart from a bit of hostility and tension in the workplace… so I knew that there would be repercussions but I really didn't know where they would come from.*(Anna)

But perhaps based on a hope or belief that there is just 'one bad apple', some whistleblowers assumed that while there might be some hostility or discomfort, it could

be managed. The underlying belief seemed to be that the ethics of the organisation aligned with those of the whistleblower and their hope was that the organisation would be primarily interested in resolving the wrongdoing. This desire to believe in the possibility of working things out is demonstrated by Anna. When she decided she need to report the conduct she had become aware of, Anna initially approached the CEO. Although this man was implicated in the wrongdoing, Anna was confident of her professional relationship with him and her capacity to deal with the situation head on:

> *My action wasn't to go and lodge a protected disclosure; it wasn't to stay back at night and photocopy secret documents and lodge an anonymous complaint or protected disclosure so I would be completely protected. I went and spoke to the people involved. I thought it could be sorted out in an adult manner without any repercussions.*

Even when Anna was suspended from her position as a direct result of her attempting to have wrongdoing resolved, she continued to believe the problems could be resolved by direct communication and without ongoing involvement of lawyers and legal processes:

> *I was not to speak to staff ... to anyone except him, and he didn't communicate with me. Because I was getting no response and I was frustrated at not being in the workplace, I decided that I had to go and confront him. I saw him come out of the video store one night. I went up to him and I said look, you know, can we just deal with this as adults? You know, it hasn't been nice, but let's see if we can move forward; it's costing me a fortune in legal fees.*
> *So I said to him look, instead of talking through lawyers, can we just sort this out ourselves? Of course we'll have any agreement made legal, but let's just sort it out so we can stop this ridiculous expense, because at the end of the day it was [taxpayers] paying for his money anyway.*
> *He said no, I'm not going to talk to you. He said, the fact is I do not want you back in the workplace. He said that in response to my statement, which was you know that I'm not guilty of anything you've accused me of doing, you know that. He replied that he just wanted me out of the workplace, despite the findings of the [independent investigation].* (Anna)

Guy was from the same department. He made two reports of wrongdoing to the internal investigations unit, thinking simply that because the unit existed, it would be best if he approached them. This unit was required to consult with the CEO on how to deal with such matters and Guy was not concerned about this either as he described himself as having '*a fair amount of respect for him.*' He also stated that he himself had '*been*

*around long enough to handle the situation as it is and [was not] naïve enough not to know you're playing with politics and sometimes it doesn't always come out the way you'd hoped'*.

Adam's confidence did not stem from his professional relationship with his direct manager, but rather because of his position as a very senior and respected bureaucrat. He reported what he saw as wrongdoing initially to his manager by way of a report on what he saw as misrepresentation of the facts and an inappropriate bid for additional funding. Although he continued '*to express disquiet'* over a period of some three months, his manager ignored the points he had raised. Adam finally went to the head of the internal audit branch, where he was encouraged to submit a formal protected disclosure to the CEO.

Another whistleblower, Eve, repeatedly submitted written reports and oral complaints about the conduct of a colleague which was clearly causing injury and putting lives at risk. She reported to her line manager and the next most senior person over a period of about 18 months: '*Then as I was getting no response from anybody that's when I went external with my concerns'*. Eve stated that management ignored and/or denied the serious problems she was reporting, insisting that it was simply a personality conflict between her and the alleged wrongdoer.

In these cases, the whistleblowers' confidence that there would be an appropriate response to their allegations was badly misplaced. However, quantitative and qualitative data demonstrate that the strong inclination to have someone within the organisation resolve the wrongdoing is shared by many whistleblowers. Even those who are not very confident of the response being appropriate, or are in fact quite clear about the risks in reporting wrongdoing, initially make internal reports. This seems to confirm not so much naivety as an underlying hope that the organisational culture is supportive of their moral agency and that the whistleblowing structures enacted in law would work as intended.

## Risk and needing to trust as opposed to confidence

Mayer distinguishes between confidence and trust on the grounds that confidence generally assumes a lack of vulnerability whereas trust requires the trustor to consider

the implications of a choice because the risks are evident (Mayer 1995:213). In the absence of confidence, what becomes of significance to whistleblowers is the question of who can be trusted. Many whistleblowers indicated that a belief or an inclination to believe in the trustworthiness of the person to whom the report was made was a very important factor. This is encapsulated by comments from Frank about deciding who to report to: *'I mean talking to people and finding someone you could trust and say look this is a problem and something needs to be done about it.'*

The WWTW survey data indicates that the majority of whistleblowers approach their line manager or supervisor: in 65.7 per cent of cases the supervisor was the first person approached (Donkin *et al* 2008:88). The question of whether to report to one's manager or supervisor was however described by whistleblowers during interviews in terms of whether these people could be trusted. Prior experience with that person is of course relevant to such a decision. Sharon was clear on this point:

> *We felt we would not get support from our next in line manager because previously we'd spoken to her about this manager's behaviour… and her comment was that we were adults and we should be able to deal with it ourselves. And we said to her that no, we are asking her advice and she said, no you two sort it out.* (Sharon)

Paula was also reluctant to report to her manager:

> *Really I should have reported to the [manager]… I just felt more comfortable with the guidance officer. I mean … I'm reporting to the idiot [manager] that let the whole thing go in the first place, you see. So I'm thinking, what's he going to do?* (Paula)

Patsy, on the other hand, did approach her manager, even though she too felt the problem had arisen because of his earlier decisions. She was asked during the interview whether she had checked departmental procedures in deciding who to report to. Patsy answered that she *'only went to the [manager]. There weren't too many options open…He needed to deal with this because he'd set up this situation'.*

It becomes even more problematic to approach a manager or supervisor if that person is in fact the specific and named wrongdoer. This was the situation that Sharon had found herself in, having then to decide who to report the manager to. As Barb noted in discussing her experience:

> *One of the problems if you're going through the line manager, is if the line manager's got no interest or is actively against you – or is actively for the person that you're reporting against. And if you involve them, then obviously there can be fairly negative consequences, I think, to yourself and those other people that were kind of on your side if you like, or were assisting you.* (Barb)

Jordan and a colleague sought advice from a senior officer in a different work area about how to deal with a problem:

> *We went to him because we trusted him and we knew that he wouldn't tell anyone and we'd get the right advice, which we did.* (Jordan)

Sharon also chose to report to someone in a different chain of command '*because I felt I couldn't trust anyone else*'.

Even when these whistleblowers believed their direct managers were not trustworthy, they preferred to look somewhere else in the organisation rather than report externally. During interview, one manager spoke about the need to encourage this:

> *Organisations that have a chain of command and require that people in their day to day work go through that chain of command are very loath to go outside it. And the organisation has to build up a climate of trust for those people to come forward… once we've got that climate of trust in place we find that people are willing to go outside that chain of command, but that's quite a battle.* (Manager_27_NSW)

The above analysis supports the contention that these whistleblowers were primarily focused on finding shared values and loyalty within the organisation. As the next section shows, their own loyalty and personal responsibility is further demonstrated by their desire to protect colleagues from any fallout as a result of their disclosures.

## Protecting oneself or one's colleagues

Several whistleblowers also spoke about making decisions in order to not only protect themselves but also their colleagues. Those protecting their colleagues tend to take sole responsibility for the act of reporting and subsequent events. For example, Eve said that when she decided to report outside the organisation she did so without telling her colleagues in order to protect them from any negative ramifications. Dennis said he hadn't asked his colleagues to make the report with him because:

> *If anyone was going to stand up, I was going to have to stand up on my own against these people. There was no way in the world that I could*

> *have gone to somebody with these issues, as complex as they were, and expect that person to commit hari-kari in front of these people.* (Dennis)

This decision was echoed by Adam who believed that as the senior officer, '*I needed to be their manager and take the – I was the one to take that up at the interface'*.

On the other hand, several whistleblowers sought safety by reporting with witnesses. Paula for instance said she went to a senior manager '*with one of my colleagues because I've learnt to always have someone who can corroborate your story. I've learnt that through [the department]'*. Bea and her colleagues went to their union to seek support in complaining about the conduct of their manager:

> *We all felt that we could do something as a group, rather than individually and that we could do it with the assistance of the [union]. Then we felt comfortable to do something about it – I think it helped us have a little bit more courage because we trusted the [union] person to get things cleared up.* (Bea)

What is demonstrated above is the courage it takes to blow the whistle within organisations, let alone contemplate disclosing integrity breaches externally. Several whistleblowers talked in interviews about compromises they had made as a result of not taking this step.

## An eye to the future: estimating risk

The quantitative data presented above reveals that believing that their action would correct the wrongdoing was an important factor in employees' decisions to report, that the risks they were taking would result in improved accountability in their organisations. One theme that emerged from the whistleblower interviews involved was a tension between taking enough action to ensure sufficient attention was brought to the wrongdoing but at the same time minimising risk to their future employment.

Guy believed that he should have reported externally if he was to have really achieved something by his disclosures:

> *At the time I thought it was better just to go the [internal investigations unit] first and I suppose in hindsight, because I wasn't happy with the outcome, I could have taken it further but both of [the investigations] took so long you've lost the point… Then going in and trying to get somebody else to start from scratch again, I didn't really know whether that was really worth it at the time.*(Guy)

Adam also felt he had compromised the outcome of the subsequent investigation by not reporting externally. Although some changes were made following his disclosure to the CEO, the whole issue was not resolved:

> *In retrospect if I wanted to really have made this stick, I should have gone to Auditor-General's.*
> I suppose I didn't have the courage to do that because of how that would alienate me from probably more senior bureaucrats.

His concern was for his career:

> *I didn't because I've got a future career in [nominated area of the public service] and even with consulting, I've got to work with [the department] and it isn't so large.*
>
> *I've come across a consultant who had worked in a different state and they were asked to change a tender at ministerial directive ... and they refused and they had similar experiences. They decided to take the redundancy that was offered and not take it to Auditor-General and they didn't use their whistleblower type provisions because of the need of their skill base to do future work in the [same] area.* (Adam)

Although not related to reporting externally specifically, Adam's fear for his future career does echo the vulnerability of part time, temporary or contract workers both to wrongdoing and to its disclosure. Marie reported the wrongdoing of the head of her department precisely because not to have done so would have meant she would not get work. She said, however that people in her position were afraid to complain '*because someone can just make up any excuse just not to employ you again, say you are unsatisfactory'*.

Scott, on the other hand, was explicitly warned by the president of his union against pursuing a course of external reporting:

> *...and he said to me "You won't win because basically I've seen whistleblowers and people that have turned over ... we've got evidence on it". And he says "It doesn't happen, it doesn't work out and you will come off second best". So from then on, I haven't bothered.* (Scott)

The analysis above indicates weaknesses in organisational culture when whistleblowers are not confident that their managers, or other more senior officers, are committed to acting ethically based on clear and shared expectations and values. That these fears are

at least sometimes valid was confirmed by some departmental managers and case-handlers who were interviewed:

> *I think in general people in my organisation don't want to report. They're afraid of reporting, they're afraid of victimisation and I think that those fears are valid.* (Manager_5_NSW)

The acknowledgement by a manager that whistleblowers validly fear of reprisals or bad treatment is of concern, not least because it implies severe limitations to the effectiveness of whistleblower legislation and procedures. As has been shown above, this fear influences some whistleblowers to delay reporting, although it is not clear how many it deters. On the other hand, it does not appear to override the desire of some to have wrongdoing corrected or to take action in accordance with their personal ethical standards.

As another manager indicated, in some circumstances whistleblowers finally take the step of reporting externally:

> *I think it might be because they're concerned about the security within the agency and want the integrity agency to do something about it independently.* (Manager_1_NSW)

Managers do not always view the decision to report externally as the wrong course of action:

> *A few of us have sort of talked about it and the only people you could really go to now would be [the corruption commission]. If you really had a problem you'd have to go the whole hog and bring someone independent in. Whether they'd let us do that is something else.*
> *I think that a really important complaint should be dealt with by an outside consultant so an outside Ombudsman. There wouldn't be the hierarchy protecting the other hierarchy… if it was an outside person they wouldn't care less. They might not ring him up and say you'd better watch your back because all these people are talking against you.* (Manager_10_NSW)

The complexities of the decision to report externally can to some extent be linked to the overall fairly limited efforts made by external accountability agencies to provide sufficient information and support to whistleblowers, and perhaps to an insufficient understanding of whistleblowing behaviour.

## Reporting externally

Rothschild and Miethe reported that many whistleblowers expected management to correct what was going on once they became aware of a problem: '*Only when senior officials showed that they were inert or complicit in the wrongdoing did the employee consider going to authorities outside the organisation*' (Rothschild and Miethe 1999:119). One of their important findings was that the response by management, either negative or retaliatory, was crucially important in the whistleblower's subsequent actions. This finding links reporting paths back to concepts of trust and loyalty and the importance of moral community based on shared values. Data from the Integrity Agency Case-handlers Survey indicates that few of those responding to reports understand the importance of these values to whistleblowers and the complex process that underlie a whistleblower's decision to make their disclosure externally.

One of the questions asked of accountability agency case-handlers was about their view of how many people had reported internally before approaching the accountability agency. The results set out below in table 5.4 indicate a huge underestimation of internal reporting.

**Table 5.4: Estimates of reporting paths by accountability agency case-handlers**

| Proportion of whistleblowers who have reported internally first | Estimate by accountability agency case-handlers (%) |
|---|---|
| None or almost none | 5.7 |
| Around a quarter | 20.0 |
| Around half | 24.3 |
| Around three quarters | 23.2 |
| All or almost all | 19.5 |
| Total | 100.0 |

**Source:** Integrity Agency Case-handler survey: Q20

Only about 20 per cent of these case-handlers made an accurate estimation that all or nearly all whistleblowers choose to report internally first (97% in the first instance and about ten per cent at any stage). These case-handlers were also asked to nominate the relative importance of three different reasons for whistleblowers approaching the external agency. Seventy-one per cent of respondents believed dissatisfaction with

support for whistleblowers from their own department was at least very important to whistleblowers and 75 per cent believed dissatisfaction with the outcome of a departmental investigation was at least very important. These estimates reflect the analysis of data about the whistleblowing experience. However, 76 per cent of integrity agency case-handlers also believed that whistleblowers would report to the agency because of confidence that they would be supported. The accuracy of this estimation is much less certain, as the following section shows.

## Being sufficiently well informed

An immediate and practical barrier to utilising accountability agencies is that not all whistleblowers are aware of their right to report externally, or how to contact accountability agencies or in fact how to present their reports of wrongdoing. As discussed above, the whistleblowing policies and procedures of case study agencies who participated in the WWTW project were evaluated. The item 'To whom and how whistleblowing concerns can be directed (externally) and in what circumstances' was shown to be reasonably comprehensive, generally including basic information about reporting to external accountability agencies and how to contact them, including web addresses. The information on websites was also very variable in quality and quantity. Little is provided by way of detail about how to make such a disclosure.

It was apparent from interviews with whistleblowers that the information about what disclosures accountability agencies would accept, and how to present reports of wrongdoing, was insufficient to be of encouragement or assistance to all potential whistleblowers. Karen, for example, stated that she and her colleague did not know whether they were able to contact an accountability agency because of the strict confidentiality provisions the department had imposed on them. They were also unsure to whom they could report the manager's reprisals against them as the departmental guidelines gave no indication: *'...we weren't sure who we were supposed to tell'.* Lois also stated she was unaware of any such avenues, and that even her union had insisted she deal with the issue only with the human resources section of her department.

Another issue for whistleblowers was knowing what issues might be taken up by an accountability agency. Del was initially clear that the wrongdoing she had witnessed

was not an issue for an external corruption commission, being insufficiently high-level or systemic. She qualified this comment later in the interview by saying that she and her colleagues did not really have enough information to know who or where they could report to outside the department.

Doug believed that the external accountability agency he approached would have been more responsive if he had made his report differently: '*With all due respect, they didn't handle it properly. I didn't prepare it as well as I should have done. I was a bit naïve*'. Doug had gone to the agency's website, got a resource pack and in accordance with the instructions presented *'a volume of information'*. In retrospect, he thought what he had presented *'... was probably too overwhelming'* and had in fact distracted from the essence of the wrongdoing he was reporting.

All three of these cases indicate gaps in the information available to whistleblowers about when or why reporting to an external accountability agency might be the best avenue for reporting, and how best to provide relevant information. Nonetheless, for some whistleblowers, as indicated above, there is a point in the process when they believe they have no choice but to press their case externally.

## A last resort

It is clear that reporting externally goes against the demonstrably strong inclination of whistleblowers to have their agency remedy the wrongdoing itself. In general, it seems to be a step taken only when whistleblowers believe that the department has breached their loyalty and trust in refusing to take appropriate action and/or visiting reprisals on them. As noted earlier, none of the whistleblowers who were interviewed had reported to an accountability agency as the first step.

A number of whistleblowers had, however, approached accountability agencies when they considered the response by their department to be less than satisfactory, to be corrupt, or when whistleblowers believed they were suffering reprisals as a result of reporting. Although the question was not explicitly asked during interviews, it is not unreasonable to surmise that by this stage in their experience, whistleblowers have little choice but to trust the integrity, if not the skill, of accountability agencies. Edith for example said she contacted the state corruption commission, *'thinking they were above*

*the corruption level. But you need to establish some kind of feeling that you have got above the corruption level before you really disclose*.'

Reporting externally is evidently a difficult decision, particularly when it is not clear to the whistleblower that, while an accountability agency may demonstrate more integrity than his or her department, it may not have the professional skills or capacity to deal with the wrongdoing. The department for which Dennis worked had, in his view, fatally compromised the investigation into his report of wrongdoing, not by incompetence but by wilfully subverting the process, and he was left in a situation where he felt he could trust no-one within the department. However, faced with deciding where else he could report, Dennis also believed that '*at that point in time there wasn't an agency capable or better capable of taking on an investigation into those sort of people'*. The response by accountability agencies to reports they receive will be taken up in more depth in later chapters. Dennis' point indicates yet another complication in the decision to report externally.

There comes a point for some whistleblowers when they feel they cannot pursue the wrongdoing, or protect themselves, without the assistance of an external agent. As Eve explained about her decision to report externally, about 18 months after her first report, she did so as she *'was getting no response from anybody [and] by that time it was getting so serious that someone knew they had to do something really drastic'*, that someone being Eve herself. In many cases this assistance is sought from unions or lawyers, particularly when whistleblowers feel at personal risk, but if the reporter is still intent on having the wrongdoing righted, accountability agencies become a more likely option.

Frank had asked management of his agency to refer for police investigation what he saw as payback allegations against him. This was an option since the allegations amounted to criminal conduct. Management refused and conducted what Frank saw as '*basically a whitewash'* investigation. One result of this was that he was forcibly transferred from his workplace:

> *...under the wrong policy and at that stage [he] referred the matter to the ombudsman... I go back to see the office of the ombudsman because I made another complaint and specifically about how [the department]*

> *investigates these things – their handling of complaints which are protected disclosures.* (Frank)

Dennis too approached the ombudsman when disciplinary action was taken against him in apparent reprisal for the reports of wrongdoing he had made. He said his department formally counselled him about matters which were not covered by rules of conduct, and that it was all intended simply to discredit him. He approached the ombudsman to appeal this disciplinary action and during that process also reported the original wrongdoing.

Anna, having been suspended from work while she was investigated and facing being sacked by her CEO for what she viewed as trumped up allegations, lodged a protected disclosure with the most senior officer within an alternative structure associated with the organisation:

> *The reason that happened was, four days after I was suspended and I was getting all this feedback that this is really serious, I was to be sacked. I thought well, okay, for survival I have to respond.*
> *I thought I'm going to lodge my own complaint about the general manager …. Obviously I should have done that as a formal complaint back then, but I didn't, so I'll do it now.* (Anna)

Anna subsequently lodged a complaint with a corruption commission '*as insurance that if [those with whom she'd lodged the complaint] didn't take me seriously that maybe [the corruption commission] would*'. Eve, on the other hand, was less sanguine about the response she might get. She did not approach an accountability agency, fearing that they would think she was 'a nutter': '*I guess I just didn't think that anybody was going to, you know, look at this seriously.*'

Anna's statements during interview support the contention that not only fear of reprisals but a determination to have wrongdoing righted are significant factors in decisions about whether to have accountability agencies involved. This is not always the case. Adam highlighted the loyalty issue whistleblowers perceive they will face if they take the path of reporting externally, even to accountability agencies: '*If I go to the Auditor-General well then that will necessarily become far more public and it probably meant that I would need to change my position and may need to leave'*. For Adam, and for

others, such action is seen as a breach of loyalty to the organisation because of the potentially negative attention attracted during any inquiry by the accountability agency.

Personal circumstances are also a factor. Although Angela was deeply dissatisfied with the response to her disclosure of wrongdoing, she decided not to pursue it, even when she was contacted by a corruption commission and asked whether she would give evidence about the poor investigation of her original report. She refused on the grounds that if she had given evidence to the commission it would have been a clear statement about her dissatisfaction with senior management in the department and it would have made living in a small community and working in the department untenable:

> *I intend to get promoted in this job and don't want to upset any [senior officer's] feathers… I'm certainly not going down that path because I already made the complaint.* (Angela)

Angela's statement about having already made the disclosure and been involved in a lengthy and contentious process indicates a further complication in the decision to pursue a disclosure externally. For some whistleblowers, the decision not to report externally was not based on future employment prospects or fearing other reprisals but simply, as Polly said, having '*run out of steam'*. Angela's statement highlights the difficulties experienced by whistleblowers during the investigation of their allegations or even in having decisions made on whether the allegations warrant such attention. It also points to a limitation of the effectiveness of external reporting paths when contact with an accountability agency is not considered as an early or initial option for whistleblowers. These points will be taken up in later chapters.

## Reporting again

As Smith and Brown report, bad treatment does have a negative effect on the likelihood of employees reporting again. While 82 per cent of respondents to the employee survey who had reported wrongdoing said they were at least very likely to report again, of those who also reported being treated badly by management and/or co-workers about 59 per cent indicated that they would do so again. Only about 35 per cent of respondents to the internal witness survey who believed they had been treated badly as a result of reporting indicated they were likely to report again (Smith and Brown 2008:127).

Analysis of the interviews with reporters gives some insight into what is perhaps one of the surprising findings of the WWTW research - the number of whistleblowers who are prepared to contemplate reporting again even when they have suffered severe reprisals or poor treatment that they perceive to be as a direct result of their reporting wrongdoing. This finding is consistent with other empirical research in the United States (Rothschild and Miethe 1999:121).

The surveys of employees and internal witnesses posed this question in terms of if the respondent had their time over again, how likely would they be to report again.

In the interviews, whistleblowers were directly asked whether they would report again and why. Some whistleblowers took this to be a question in line with the survey, as in 'if they had their time over again would they report' and others contemplated reporting further wrongdoing if they witnessed it some time in the future. Nearly everyone interviewed at least contemplated the possibility of reporting again.

Those whistleblowers who said they would not take this course of action again referred to exhaustion, the personal cost being too high and their disappointment in the department's response to the alleged wrongdoing and to them. Angela was clear about this:

> *[I would] never report another thing ever to [the department] because of how I was treated. I did all the right things and somehow they managed to turn it back on me that I had, you know, failed in some way … and they are totally incorrect… because it was them almost questioning my integrity because I was thinking if they are not believing me they must be believing [the alleged wrongdoer's] version of events and so for me to have my integrity questioned is to me like the utmost insult.* (Angela)

Sharon said she was not sure she would have the energy to do it again:

> *And I'm sure realistically it would not be as bad, but to make such a big complaint against someone of that position would still take a lot… it would have to be something very severe.* (Sharon)

There is still a cost to whistleblowers who contemplate not reporting again as Scott revealed. He said he wouldn't report again because it wasn't worth it: '*I'd just keep my mouth shut, I think, and swallow a bitter pill because it's not how you should be doing it.*' Scott believed the professional cost to him of reporting was extremely high: '*I know*

*I'm not going any higher, which is a shame, because I would have easily got to the next level, there's no doubt about that, but yes, definitely not now because I've upset the hierarchy.*' He had also been forcibly transferred to more than one remote location. For Scott, though, the turning point was that he had come to believe the department's response to reports of wrongdoing were only ever going to be '*a whitewash*' and that his demonstration of ethical conduct, moral agency, would never be sufficient to change the departmental culture. Confirmation for this had come when the president of the union had warned him against reporting externally.

In balancing the utility of reporting against its professional and personal cost, Scott reluctantly compromised on what he saw as his personal ethical responsibility. This is precisely the kind of situation that whistleblower protection legislation and the availability of external reporting paths is intended to address.

This same sense of personal responsibility and obligation to be morally accountable for their actions (Dubnick 2007:28) is what most whistleblowers refer to when explaining why they would report again. Frank, who had been forced out of his position and was on the verge of taking a stress-related medical retirement at the time of being interviewed, was clear about this:

> *If the same thing happened again I would have to do something about it? The answer is probably. It's a matter of personal integrity. If you haven't got your own personal integrity well then you've got nothing as far as I'm concerned.* (Frank)

Although Paula had not reported until advised she might lose her job, she too referred to her conscience as well as her duty:

> *I would have to for three reasons: one it's the law and I consider myself a law abiding person. Two it is [departmental] protocol and I'd be stupid not to follow the protocols. I mean that's who pays my wages. And three, my conscience tells me that's the right thing to do … The worst thing to me would be to lose with my integrity. I really couldn't cope with that. I have to do what I think is right. I would definitely do it all again.* (Paula)

Both Karen and Marie said that they could not stand injustice and so would report again. Karen laughed and said: '*probably – I'm stupid enough. I believe in truth and justice and so on… I think it would probably be just as bad'*.

This ambivalence was evident in many responses. It was not that whistleblowers necessarily thought they could manage reporting any better a second time. Those who said they would report again generally referred to the necessity of stepping beyond their initial reluctance in order to preserve precious personal standards and/or a belief that reporting might resolve wrongdoing. Colin's need to embody personal ethical standards has been discussed. For Bea, the opportunity offered by reporting was a much more powerful option than giving up personal responsibility for promoting a more ethical climate in the department:

> *Yes, I mean I think I always would because I think you've got to believe that you are capable of making the change… I think it's a positive and powerful thing to do so that you don't feel like you're trapped and I guess stuck in the system.* (Bea)

## Doing it differently next time

One of the striking features of the responses to the question about reporting again was not only that whistleblowers said that they would, but the frequency with which they said they would do it differently next time. In some cases the basis for choosing a different path seemed to be based in the hope that some or indeed any other process might be less demanding or painful. For others it was a hope for some more fruitful outcome of their reporting of wrongdoing. Given the strong propensity to report internally in the first instance, the different path frequently suggested was reporting to an external accountability agency. Several alternatives were suggested by those who would still report internally – reporting anonymously, more informally or in fact, following formal rules more closely. Contemplating making disclosures more formally is associated with contemplating reporting externally.

Some whistleblowers, like Mona, believed there might be protection in remaining anonymous: *'… it's very difficult to fight a huge department… if I do it in the future, I will tend to try and do something anonymously'*.

Frank was very clear that he would report again but he gave several versions of how he would go about doing so. In answer to the specific question about reporting again, Frank's view was that he would actually be less likely to make a formal complaint as

this had not worked for him, but he would try to resolve the wrongdoing through informal channels within the organisation. What he meant by informal was:

> …talking to people and finding someone you could trust and say look this is a problem and something needs to be done about it. (Frank)

Karen also thought a more informal approach might be better:

> *I don't think I'd take on the protected disclosure. I think I'd rather it was all out in the open. But then you don't know what the circumstances are going to be, so it would depend on what the issues were I suppose.* (Karen)

Later in the interview with Frank, during a discussion about the lack of confidentiality in the way his report had been dealt with, and the difficulties he perceived this had cause for him, Frank laughed and said:

> *What you should do before you make any disclosures is go and read the Act, go and see the ombudsman, get a lawyer and then make the allegation and then quit.* (Frank)

Anna, on the other hand, would not try an informal approach again, saying she would ensure she lodged a formal protected disclosure in order to attract legal protection, and '*if that meant going outside the organisation rather than internally as I've always been led to believe that you have to do, then I would go external'*. Anna also said that she would not report alone as she felt there would be less potential of being singled out for reprisal action.

Colin and Adam both spoke about reporting more formally if they were to do so again. Adam said he would certainly make a disclosure directly to the chief executive of the department but also:

> *I'm probably a shade more likely to do it to Auditor General ... and have a bit more confidence in the external scrutiny of the process.* (Adam)

Colin also indicated an ongoing preference for reporting internally but with more precise compliance with procedures as a way of compensating for his lack of confidence in an appropriate response:

> *I think that what I'd do is I would try to follow whatever procedures or protocol were in place so that I couldn't be told, "That had nothing to do with you", all that sort of thing. At least get that part of it absolutely*

> *right so they couldn't say, you know, pull up these minor issues and sort of cloud the whole thing.* (Colin)

At a later point in his interview, Colin stated that he might, in fact, '*steer clear of the system itself'* and not report within the department at all because it was so difficult to find someone to trust and because *'[his] experience over recent years is just that it doesn't work. It doesn't support anybody and there's no outcome. There's no improvement'*. Colin felt he was more likely to report directly to an external accountability agency. His statement, echoed by Ken, indicates that not all whistleblowers are aware that they are able to report directly to an external accountability agency without reporting internally in the first instance. Ken's comment was that he would probably '*bypass certain processes'* and go directly to an external accountability agency, unless '*it was just a small thing when I'd probably rant and rave and shout and roar more so than anything'*.

Two findings from the above analysis are particularly relevant to an understanding of decisions to report externally. The first is that whistleblowers are not necessarily aware that, even if departmental procedures promote the making of internal disclosures, disclosures can be made in the first instance directly to external accountability agencies. This indicates a shortcoming both in departmental procedures and the information published by external accountability agencies.

The second finding is that once whistleblowers feel they cannot resolve matters fairly informally within their departments and have to contemplate making formal disclosures in order to attract legal protections, the step to reporting externally is much smaller. It seems likely that this is related to whistleblowers initially assuming a 'moral community' of shared ethical values within the department which obviates the need for formal protection. Having to consider formalising an internal disclosure and attract legal protections indicates to whistleblowers that their trust has been breached. As suggested by Braithwaite's regulatory pyramid (Braithwaite 1998) the regulatory response is to call upon more formal and increasingly coercive interventions. The bigger step is away from trust and the move from internal to external reporting becomes just a matter of degree.

Although whistleblowers are very inclined to report internally and to have wrongdoing remedied by the organisation itself, it is apparent they often find the results of any investigative and decision-making process disappointing, if not in fact devastating, both professionally and personally. Given the evident strength of whistleblowers' commitment to having the wrongdoing stopped and acting in accordance with personal ethical beliefs, it is perhaps not surprising that they would report again. Given the abuse of their trust in management and loyalty to the agency it is also not surprising that whistleblowers are less inclined to report internally again but rather will utilise the external reporting paths that form part of the framework of accountability established by the legislation.

## Conclusions

This chapter has analysed the first stages in blowing the whistle: identifying wrongdoing, deciding to report and choosing to whom to report.

Quantitative data obtained and analysed by the WWTW research team confirms earlier research in the United States that employees show a strong inclination to report within their own departments and to have management resolve these problems without the involvement of external agents. These quantitative data also indicate that employees generally choose to report wrongdoing for highly ethical reasons: personal ethical responsibility, a belief that the wrongdoing was serious enough to warrant a significant response and that the whistleblower's action would assist in correcting that wrongdoing. Not believing that anything positive would result from the report was a significant reason for whistleblowers to delay taking action. The risks of reporting are very evident to the majority of whistleblowers but personal ethical standards require them to take some action to stop the wrongdoing.

Many whistleblowers talked in one way or another about their need to identify someone in the agency whom they could trust to report to. Identifying the need for trust implies an understanding of risk but perhaps more importantly, reporters demonstrate loyalty to the agencies in which they are employed precisely because they put themselves at risk in order to give management an opportunity to remediate the wrongdoing.

Accepting Vanderkerckhove and Commers' argument (2004) that loyalty is to the aims, mission statements and codes of conduct that define the organisation's values and legitimate purpose and set out the boundaries for the conduct of employees, the loyalty demonstrated by reporters can then be conceived of as loyalty to the kind of moral community proposed by Dubnick and Justice (2004). Dubnick's concept of accountability (2007) is particularly relevant where whistleblowers take personal responsibility for the promotion of an ethical culture, by exercising moral agency and reporting integrity breaches to someone within the department with authority to remedy the breach. In addition, whistleblowers' tendency to believe that they and the department they work for have closely aligned moral standards and shared values. This belief also underpins their inclination to report internally.

The WWTW analysis reveals that one of the few differences in the 'organisational citizenship behaviour' of whistleblowers and non-reporters is that those who report are marginally less trusting of the management team. There is lower trust again among those who report externally – whether initially or at a later stage in the process. But given these people were surveyed on experiences they already had, it is difficult to use the quantitative data alone to analyse whether the trust issue arose after they had problems with reporting rather than in advance of it – particularly given the extremely strong tendency towards internal reporting. The analysis in this thesis strongly indicates that while the issues of risk and trust present real issues for reporters in choosing a reporting path, it is only when their trust and loyalty are breached that reporters begin to seriously contemplate utilising external reporting paths and approaching accountability agencies.

In light of the analysis in this chapter, it cannot be said that accountability agencies achieve the first aim of whistleblower protection legislation, facilitating the making of disclosures. As discussed in Chapter 4, some accountability agencies provide assistance to departments in developing their own reporting procedures. Beyond this, accountability agencies take few steps to encourage reporting, either internally or externally. There are perceived and real risks in reporting externally – negative attention to the agency and increased likelihood of reprisals against reporters. Further barriers to

reporting externally are created by accountability agencies themselves through the limited or technical information available to potential reporters.

As a last resort, however, whistleblowers will approach external accountability agencies. Those who stated they would report again indicate an increased likelihood of making disclosures to these agencies. Reporters give as their reasons for contemplating or actually reporting externally, the poor internal investigation of wrongdoing, a senior officer's decision to do nothing despite the findings of an internal investigation or the poor treatment of the whistleblower themselves. Accountability agencies' responses to reports of wrongdoing are the subject of the next chapter.

# Chapter 6 Responding to reports of wrongdoing

> You will make all kinds of mistakes: but as long as you are generous and true and also fierce, you cannot hurt the world or even seriously distress her. (Winston Churchill)

## Introduction

The previous chapter analysed the experiences of people choosing to report wrongdoing that they had identified in their workplaces. It was established that people are very inclined to report internally through the management structures of the agency for which they work, but that as a last resort they will approach external accountability agencies, particularly if they believe their loyalty to, and trust in, the organisation which employs them have been breached.

The analysis of reporting patterns and experiences provided a detailed understanding of whistleblowers as a mechanism for the first core process or stage of accountability: providing information (Mulgan 2003:30). As has already been discussed, the particular usefulness of whistleblowers is that they are able to provide information that might not otherwise become available. The purpose of this chapter is to analyse the response of external accountability agencies to whistleblowers' disclosures: the investigating, justifying and debating stages of accountability (Mulgan 2003:30). Ensuring that disclosures are properly responded to is also the second aim of whistleblower protection legislation. The analysis indicates that accountability agencies are failing to achieve this aim.

The chapter begins by examining the expectations of whistleblowers, using data from the WWTW Internal Witness Survey to establish the low rates of whistleblower satisfaction with the outcomes of reports. Building on the analysis in Chapter 5, it argues that whistleblowers are likely to have high expectations which are difficult to meet. The chapter then examines three sets of problems with the response of external accountability agencies which become evident from further analysis of empirical data. First, there are issues that are internal to accountability agencies including the adequacy

of assessments of allegations and the limitations that arise from resource constraints, including pre-existing priorities and delays, as well the variable skill and professionalism of investigators and investigations. Secondly, there are difficulties that are apparent in the relationships between accountability agencies and departments, particularly in terms of the referral of disclosures back to departments for investigation, the sometimes heavy-handedness of accountability agencies in their dealings with departments and the handling of confidentiality. The analysis of this set of difficulties reveals practical issues associated with the concept of 'distributed integrity' discussed above (Brown and Head 2005:84-85).

Finally, there are the problems that can arise in the arrangements made between accountability agencies intended to ensure the right agency deals with a whistleblower's disclosures.

To rely only on the whistleblowers' views of accountability agencies would risk developing a picture that is one-sided and insufficiently detailed or complex. For example, the decision by an accountability agency to decline to take any action in response to a report may well have been appropriate, but may equally have left the whistleblower feeling dissatisfied with the response, and more likely to be critical of the accountability agency. In this thesis, no assessment of the truth or otherwise of allegations made by whistleblowers has been made. Such verification would not have been possible while at the same time preserving the necessary confidentiality of the whistleblowers who participated in this study, since information about their particular allegations would have to be sought from either from departments or external accountability agencies. This analysis does therefore tend to rely on whistleblowers' views on their reporting experiences. While this reliance on whistleblowers' versions of events may not reflect an appropriate response by an external accountability agency to the subject of the disclosure, the allegations are only part of the picture of whistleblowing: the protection and support of whistleblowers is a significant aim of legislative and policy frameworks. Once again, while the views of whistleblowers on the extent to which they believe they have been protected is one essential part of the picture, the views of departmental staff and accountability agencies are also significant.

Those data do not match the whistleblower data directly but are used to develop the additional perspective.

In order to develop as complex a picture as possible and to enable a detailed analysis of responses to whistleblowing by accountability agencies, this chapter uses quantitative data derived from survey responses from whistleblowers, departmental managers and case-handlers to present a broad picture. Qualitative data from semi-structured interviews with whistleblowers, managers and case-handlers are then used to explore in greater depth the complexity of experiences represented in the statistical patterns. Data in the form of free-text responses to surveys from both these groups and case-handlers in accountability agencies are also used.

While this approach does not address issues of validity in relation to specific whistleblowers, allegations of wrongdoing or the views of managers and case-handlers, it does add rigour, breadth and depth to the analysis of investigative processes and outcomes, particularly through the resulting focus on the structures within which whistleblowing occurs, and their limitations (for a general discussion of this approach, see Denzin and Lincoln 1998:4).

The different types of accountability agencies included in this analysis vary not only in their jurisdictions but also, within their jurisdictions, in their ways of investigating or resolving wrongdoing. Information about these various approaches is provided on the agencies' websites, but is not specifically detailed as part of the specific advice for whistleblowers. The following very brief summary expands on the explanation of the agency roles in Chapter 2 and provides additional information that contextualises the experiences of whistleblowers. Ombudsmen, for example, are generally offices of last resort when efforts to resolve complaints locally have failed and they are usually required to provide a response to the complaint brought to them (see, for example, NSW Ombudsman Fact sheet 15 'Oversight of public administration'). Corruption commissions, on the other hand, can for obvious reasons take complaints of corrupt conduct without any attempt by the complainant to resolve the alleged wrongdoing. They are able to take such reports as intelligence without necessarily providing information about any outcome.

In order to take into account these different approaches, accountability agencies are referred to in generic categories in this thesis: auditors general, ombudsmen's offices, corruption commissions, public sector employment bodies. Specific agencies are not identified since this might tend to identify the whistleblower, and because it is not the purpose of this study to focus on the actions of particular accountability agencies but to analyse the range of actions taken in response to whistleblowers.

## Whistleblowers' expectations

What becomes apparent from the analysis below is that accountability agencies rarely treat whistleblowers and their allegations any differently from other complaints and complainants: the same processes of inquiry and complaint/complainant management are employed. The limitations of this approach – from the perspective of both whistleblowers and departmental staff - become clearly apparent.

### Quantitative data: levels of satisfaction

The results of the WWTW Internal Witness Survey indicate that whistleblowers are not very satisfied with the outcomes of their reporting, including when they report externally.

Table 6.1 below shows how many respondents used a particular reporting path and their satisfaction or not with the outcome achieves.

**Table 6.1: Levels of satisfaction – with outcome of first report**

| Avenue of reporting | Levels of satisfaction | | |
|---|---|---|---|
| | Not satisfied* | Satisfied to some degree* | Total # responses |
| **First report to:** | | | |
| Supervisor | 69 (86%) | 11 (14%) | 80 |
| Another manager | 67 (86%) | 11 (14%) | 78 |
| CEO | 22 (85%) | 4 (15%) | 26 |
| Ethical standards unit (internal) | 14 (88%) | 2 (12%) | 16 |
| Internal audit or fraud unit | 13 (77%) | 4 (23%) | 17 |
| Internal ombudsman or complaints unit | 7 (70%) | 3 (30%) | 10 |
| Human resource/equity or merit unit | 20 (87%) | 3 (13%) | 23 |
| Internal hotline or counselling service | 7 (88%) | 1 (12%) | 8 |
| External hotline or counselling service | 4 (100%) | 0 | 4 |
| Peer support officer | 5 (83%) | 1 (17%) | 6 |
| Union or professional association | 22 (96%) | 1 (4%) | 23 |
| Government watchdog | 19 (95%) | 1 (5%) | 20 |
| Member of parliament | 8 (100%) | 0 | 8 |
| Journalist | 2 (100%) | 0 | 2 |
| Someone else (not specified) | 10 (83%) | 2 (17%) | 12 |

**Source:** Internal Witness Survey Q36 and Q30

* Responses to the question of 'how satisfied were you with the outcome of this investigation' rated whistleblowers' level of satisfaction on a five point scale: 'not at all' 'not very' 'somewhat' 'very' and 'extremely'. This table summarises the responses amalgamating the two categories of dissatisfaction and including the range from 'somewhat' to 'extremely' in a category of 'satisfied to some degree' as indicating some level of satisfaction with the outcome achieved.

The total number of respondents to the Internal Witness Survey was 242, and the data above indicate that 333 reports were made, so whistleblowers obviously made their reports to more than one person in the first instance. Care needs to be taken not to exaggerate the implications of the table since the numbers are quite small, but the patterns are very striking.

The percentages shown are of the total responses to each item and therefore indicate levels of satisfaction with each avenue of reporting. The data confirm whistleblowers' distinct preference for use of internal reporting avenues, but also indicates low levels of

satisfaction with the outcomes of these reports. What also becomes clear is the overall level of whistleblowers' dissatisfaction with the outcomes of reports they have made to 'government watchdogs' - external accountability agencies. Only one of the 20 people who reported to an external accountability agency indicated any level of satisfaction with the outcome of the report. This result was worse than for any internal report option and the second lowest level of satisfaction with any external avenue of reporting despite these agencies having much greater legal power to deal with the reports made to them than unions, members of parliaments or journalists.

Whistleblowers were asked whether their reporting of wrongdoing ended with the first attempt to have matters resolved. Slightly more than 60 per cent advised that they reported the wrong doing again. They were then asked to whom they made subsequent reports. In Table 6.2 the results of this survey question are again cross tabulated with the levels of satisfaction whistleblowers felt with the outcome of their further reports.

**Table 6.2: Levels of satisfaction – with outcome of subsequent report**

| Avenue of reporting | Levels of satisfaction | | |
|---|---|---|---|
| | Not satisfied* | Satisfied to some degree* | Total # responses |
| **Further report to:** | | | |
| Supervisor | 11 (69%) | 5 (31%) | 16 |
| Another manager | 27 (75%) | 9 (25%) | 36 |
| CEO | 28 (85%) | 5 (15%) | 33 |
| Ethical standards unit (internal) | 20 (80%) | 5 (20%) | 25 |
| Internal audit or fraud unit | 19 (73%) | 7 (27%) | 26 |
| Internal ombudsman or complaints unit | 4 (80%) | 1 (20%) | 5 |
| Human resource/equity or merit unit | 16 (80%) | 4 (20%) | 20 |
| Internal hotline or counselling service | 7 (88%) | 1 (12%) | 8 |
| External hotline or counselling service | 3 (50%) | 3 (50%) | 6 |
| Peer support officer | 4 (57%) | 3 (43%) | 7 |
| Union or professional association | 30 (88%) | 4 (12%) | 34 |
| Government watchdog | 35 (86%) | 5 (14%) | 40 |
| Member of parliament | 15 (83%) | 3 (17%) | 18 |
| Journalist | 6 (75%) | 2 (25%) | 8 |

**Source:** Internal Witness Survey Q38 and Q44

* As with table 6.1 responses to the question of 'how satisfied were you with the outcome of this investigation' rated whistleblowers' level of satisfaction on a five point scale: 'not at all' 'not very' 'somewhat' 'very' and 'extremely'. This table summarises the responses amalgamating the two categories of dissatisfaction and including the range from 'somewhat' to 'extremely' in a category of 'satisfied to some degree' as indicating some level of satisfaction with the outcome achieved.

The level of satisfaction with action by an accountability agency is slightly higher than it was for initial report but is still very low at only 14 per cent. The result is still worse than most other reporting options, either internal or external. The analysis below examines a range of factors which may have contributed to whistleblowers' dissatisfaction with the response by an accountability agency. These can be summarised as whistleblowers having very high expectations of accountability agencies, being disappointed by accountability agencies' decisions to take no action, viewing investigative action as insufficiently independent or thorough and falling through the gaps in coordination between accountability agencies.

## The bar set high

It has been established that whistleblowers who approach an accountability agency do so when they perceive their own department to have failed and their trust has been significantly breached. The main reasons for whistleblowers believing their trust and loyalty have been breached are based on perceptions of their allegations being poorly or insufficiently investigated, insufficient or no action to deal with the wrongdoing or the perpetrator when matters are investigated, or because the whistleblower believes they are suffering reprisals as a result of their reporting. The following quotes from whistleblowers indicate that the approach to an external accountability agency is a last resort:

> *As a result of an investigation into the allegations, which was basically a whitewash, I was forcibly transferred under the wrong policy and at that stage I referred the matter to the ombudsman.* (Frank)

> *I received zero support or contact in relation to my reporting of this fraud. Lack of contact by Senior Management left me feeling like I had done the wrong thing. Felt like I maybe should have just left it alone… I felt my CEO was annoyed but having worked at a senior level I knew that I needed to report this to the [corruption commission] given the large $$ involved.* (Internal Witness Survey respondent)

This means that the bar is already set very high in their expectations of accountability agencies – resolution of the wrongdoing, an end to reprisal action and restoration of their position and status, or at least acknowledgement of the appropriateness of their action in reporting. For some, the expectation includes also some restoration of their trust in government agencies.

The information promulgated by accountability agencies on their websites and in their annual reports confirms that whistleblowers can and should approach accountability agencies as a legitimate reporting path within the accountability structures of government, particularly if they are dissatisfied with action taken by departments. There is generally information on accountability agency websites to indicate that the agency will assess each report made and then decide what action needs to be taken. That the agency may decline to take any action is implied rather than specified (see Chapter 4). Little information specifically prepares whistleblowers for the range of responses from accountability agencies that might not meet their expectations.

There is of course another interpretation of the persistence shown by some whistleblowers in having their allegations re-investigated by external accountability agencies. This interpretation is generally offered by managers and case-handlers and it generally involves a view that whistleblowers are unreasonable in their persistence with reporting. Managers view some whistleblowers as being are unable or unwilling to accept that evidence is unavailable to prove their allegations:

> *Sometimes people will go to them because they're not happy with the answer that they're getting from our internal investigations and people have to understand that you have to be able to collect enough evidence to actually sustain something against someone and sometimes their expectations are maybe unrealistic, or they have information which they think because of their personal skew on things is more significant than it actually is, and they make take it to that agency.* (Manager_1_NSW)

A second view is whistleblowers reporting externally as a way of circumventing departmental procedures:

> *They could still report to their manager who has a requirement, if they need to, to assess and report to [internal investigation unit]. And if it's their manager they're upset about, the policies very clearly state that you report to the next rung up. So there's a process. But I think people, either because they don't understand or, quite deliberately sometimes circumvent that and try and escalate it.* (Manager_2_NSW)

Other managers interpret external reporting as whistleblowers refusing to accept that the outcome of an internal inquiry is appropriate or that their allegations might simply have been unfounded:

> *If they feel so aggrieved I don't think they'll get satisfaction through the management, then they go to exterior confidential reporting systems ...People want to have their own way and in many instances if they can't, they seek an umpire's decision. They go externally to get what they want, rather than to get to the truth.* (Manager_2_WA)

Manager_1_WA, who was quoted in Chapter 2 as being concerned about the term whistleblowing making people feel special, indicates in the quotation below a belief that this specialness makes it very difficult for line management to resolve matters identified by whistleblowers. There is not, however, any acknowledgement that the department's response might be insufficient and whistleblowers might have good reasons for reporting externally:

> *Sometimes, with the new style of thinking that we have, people feel immediately outside the system for reasons which may affect them. They may be at fault themselves in not seeing a whole raft of issues that have come out of the personalities of people and if they feel so aggrieved, I don't think they'll get satisfaction through line management, then they go to exterior confidential reporting systems that they have available.* (Manager_1_WA)

There is no doubt that it is important for accountability agencies to manage any complainant's expectations of the outcomes of investigations or inquiries. Given the difficulties already faced by whistleblowers, and the perilous situations that they may have found themselves in at work, it is likely that their expectations and needs will be higher than an ordinary complainant. Manuals and information sheets produced by external accountability agencies, for example the NSW Ombudsman, refer to the need to manage whistleblowers' expectations:

> *It is vital to ensure that whistleblowers' expectations are realistic. If a whistleblower develops unrealistically high expectations, dissatisfaction invariably results with either the way the agency or relevant staff has dealt with the disclosure or the outcome of any action taken in relation to their disclosure… If [their] expectations seem unrealistic, the reasons for this assessment should be fully and clearly explained to them at the outset. This message can then be reinforced as necessary during the course of any action taken in relation to their disclosure.* (NSW Ombudsman Protected Disclosures Guidelines 5th edition 2009:B-3)

Notwithstanding any issues resulting from high expectations, it is useful to examine the problems that whistleblowers encounter in terms of the structures within which accountability agencies operate and the frameworks established for dealing with whistleblowing. Three sets of problems become evident: (1) problems within accountability agencies, which include resource constraints that lead to a narrow focus and limited investigative capacity, the adequacy of assessment processes and the time taken to complete inquiries and investigations; (2) problems arising from the relationships between departments and the accountability agencies which oversee their conduct, including disagreements about the focus of investigative action, the referral of matters back to departments for their investigation, and issues with maintaining the confidentiality of whistleblowers; (3) difficulties which arise from the relationships between different accountability agencies within any given jurisdiction. There is no

evidence that this last category of problems occurs frequently, but the effects of the failure to communicate properly can have significant ramifications for whistleblowers. These issues are examined in turn in the following sections.

## Issues within accountability agencies

All external accountability agencies have processes to determine which matters brought to their attention will be pursued, which will be referred elsewhere and which will simply be declined. The first response to the whistleblower will therefore be the results of this initial determination.

Accountability agencies may decline to take action on a complaint or disclosure for several reasons: existing priorities and resource constraints, jurisdictional limits and focus. In some cases, whistleblowers believed that the accountability agency had not fully assessed and understood the allegations and the implications, but they were powerless to influence the agency to take action. In other instances, whistleblowers were referred on to another accountability agency deemed to be more suitable or were in fact referred back to the original department. All of these responses can be problematic for the whistleblower. The main sources of whistleblowers' dissatisfaction with the initial response by accountability agencies mirrors the concerns they expressed about departmental responses to reports. Generally speaking, whistleblowers do not believe they themselves or the allegations they are making are being taken seriously enough. The reasons for this are examined more closely below.

### Accountability agency priorities

One element of the assessment process which comes as a surprise to whistleblowers, and leads to dissatisfaction, is that even when their allegations are assessed as being genuine whistleblowing matters, an accountability agency may still decline to take any action because of pre-existing policy decisions about where the agency will focus its attention and resources.

Adequate resourcing is an issue for all public sector organisations, including accountability agencies. As Brown *et al* note:

> *Governments may pass laws or establish institutions related to integrity, but this does not guarantee them the necessary legal or financial resources to have an impact.* (Brown *et al* 2004:6)

Although the work of accountability agencies is largely demand driven, and agencies' annual reports demonstrate that complaint numbers continue to rise, allocation of funding does not necessarily increase in proportion. These agencies therefore have to develop strategies to deal effectively with as many matters as they can. These strategies are outlined in agencies' annual reports. The NSW Ombudsman refers explicitly to a reliance on 'distributed integrity':

> *We still investigate more serious complaints but, in many cases, we encourage agencies to handle complaints themselves. If necessary we can give them support or directly monitor how their investigations are progressing.* (NSW Ombudsman Annual Report 2003-04:6)

Tightly focusing expensive investigative action on more serious matters is another strategy, as the following reports from corruption commissions indicate:

> *The Commission is currently receiving more than 200 complaints a month and accordingly must be selective about the investigations it undertakes.* (Corruption and Crime Commission of Western Australia Annual Report 2003-04:2)

The seriousness of the matter is usually the basis of this selection process:

> *In a small, but not insignificant, percentage of matters the issues are so serious, widespread or important that the Commission decides to investigate them itself.* (Corruption and Crime Commission of Western Australia Annual Report 2004-05:17)

When the agency deems a matter less serious, it is referred back to the department:

> *Our experience suggests that an overwhelming proportion of matters reported to the CMC related to suspected misconduct of a relatively minor kind which could be safely dealt with by the agency involved. More serious complaints continue to be investigated by the CMC — 105 this year. Many of those investigations were substantial.* (Crime and Misconduct Commission Annual Report 2003-04:2)

Whistleblowers in this study were aware of the selective focus of external accountability agencies, but did express some resentment or resignation at their matters not being considered sufficiently serious:

> *I think one of the problems with the ombudsman is one of funding… As I said, unless it's something very big and very political I just don't think they're going to be interested.* (Frank)

Alec reported being told, '*look even though there is evidence of corruption, under our charter, we don't have to investigate every complaint*'. Polly reported an informal conversation between her and a senior officer of a corruption commission:

> *He said I'm sorry there's just not enough money involved in this for it to be a priority. He was very kind, very tolerant – it was an informal conversation. He said, look you can keep going if you want to, but there's not enough money in it. We're looking a big fraud, millions of dollars – we're not going to take over one person ripping off [the department]. Just try to be realistic.* (Polly)

Roy talked at some length about his experience of providing extensive information at the request of a corruption commission, only to be told eventually that no investigation would be conducted:

> *I contacted [a corruption commission] and they were very interested the first time I spoke to them. It took four hours. That went on for the better part of a couple of years. In the end, pretty much the word that I got back from them is that your story is much more plausible than what [the agency] said, but you don't have the killer document and we deal in misconduct more on a systemic basis than a one off basis, we have limited resources so we haven't proceeded with this at this stage. We haven't done anything. It seemed like I was providing a lot of information – but it seems all the way along the line [a corruption commission] never wanted to get involved in this… they viewed this as a local spat and it wasn't in their agenda or their political interest to do that.* (Roy)

Managers and case-handlers also commented on the restricted focus of accountability agencies:

> *They don't generally investigate. They usually send it back to us to deal with. It's very rare for them to investigate unless it was a very serious matter like some of the significant public interest reports [refers to publicly known corruption scandal]. That might be the sort of thing that an integrity agency would get involved in.* (Manager_2_NSW)

> *I was quite shocked as I thought that the ombudsman or the [corruption commission] that you could go to them about anything, any wrongdoing at all so it was quite a surprise then to hear back from them that there are certain things that aren't in their jurisdiction or that they can't investigate or have no control over.* (Manager_1_ Qld)

The resentment engendered by the treatment of reports as not being serious enough is clear. Two respondents to the Internal Witness Survey even viewed accountability agencies as just another part of a flawed government structure:

> *Ombudsman (corrupt in itself, designed to cover up wrongdoing and protect organisations from public exposure. Generally an organised façade to try and fool the public into thinking watchdog agencies exist for genuine reasons.* (Survey respondent)

> *[Integrity agencies] are all still government departments and they often also say they can't do anything – not in their jurisdiction.* (Survey respondent)

## Avenues of last resort

Accountability agencies may acknowledge the seriousness of an allegation, but may still require other processes to be finalised before they get involved. This is consistent with the general principle of matters being dealt with locally and minimising double handling of investigations, thereby limiting unnecessary expenditure of resources. It can also give rise to an apprehension among whistleblowers that the agency simply does not want to take on the work. This was Anna's experience with a corruption commission:

> *It was the same as the one I lodged to the organisation. I did that I suppose as insurance that if [the department] didn't take me seriously maybe [the corruption commission] would. Because it was an allegation of corrupt conduct. Initially [the corruption commission] were responsive, but they said no, because this independent lawyer is investigating that's the most appropriate place for it to be and they would await that outcome and they asked me to keep them informed.*

When the lawyer's investigation was complete Anna, as requested, contacted the corruption commission again:

> *So when I got the recommendations back ... I wrote to [the corruption commission] and I said these are the findings. They said oh great, it's all over, you got the outcome that you wanted so there's no further role for us to play. So as far as they were concerned it was finalised….*

Even when the chief executive refused to implement the lawyer's recommendations, and a further threat was made against Anna, the corruption commission was uninterested:

> *I went back many times [including saying CE refused to take action in response] and also with new information…I never made any idle allegation. Everything I ever wrote was a name, a date, a time, a*

> *place… I went back to [the corruption commission] with what I interpreted to be a threat. They said that if the [person] who had reported that information was asked he would probably just deny having heard that so based on that they weren't going to investigate…*

But the chief executive refused to act on the recommendations and reinstate Anna, and seemingly allowed extremely threatening public statements about her to be made by the department's legal counsel. According to someone present at the meeting who reported it to Anna, the lawyer stated:

> *…this girl is in a lot of trouble, I'm going to jackhammer her head through the ground. Apparently the [staff] and the [chief executive], who were the only people present, were highly embarrassed.*
> *One [staff member] that I know of went up to the [chief executive] at the end of the meeting and said you are never to use this lawyer again, that's a disgrace. I mean that was a threat, a physical threat. I was told that the [chief executive] was highly embarrassed by it, but nevertheless, they seem to be the types of lawyers that get employed to get rid of people.*

The chief executive continued to use the lawyer in the attempt to have Anna dismissed from the organisation. So Anna went back to the corruption commission:

> *They said that if the [officer] who had reported that information was asked he would probably just deny having heard that, so based on that they weren't going to investigate. So I rang the investigator and I said you know, every criminal I've ever heard of usually denies having done something but you don't not investigate, and particularly something as serious as I think this is.* (Anna)

No accountability agency took up Anna's complaints about reprisal action against her. The process finished with the industrial proceedings she had initiated (which were settled out of court on the recommendation of the Industrial Relations Commissioner). Ultimately no-one investigated Anna's complaints of corrupt conduct and maladministration either.

## The adequacy of assessments

Another aspect of whistleblower dissatisfaction is the belief that accountability agencies do not always make adequate assessments of the wrongdoing reported to them.

One of the beliefs of some whistleblowers was that accountability agencies did not always understand the implications of the reports they had made. As one stated:

> *Legal interpretation obviously requires training. The way you phrase your complaint can have a large effect on the use of the information you give [the corruption commission].* (Survey respondent)

Two other whistleblowers spoke quite extensively about how they felt that they had not presented their material sufficiently well – that they had not made the issues clear enough for the accountability agency to understand easily. About the submission he had made, Doug said:

> *With all due respect they didn't handle it properly. I didn't prepare it as well as I should have done. I was a bit naïve. I thought I'd done my homework. I got in touch with the [the corruption commission] website and got a resource pack from them and presented what I thought was a volume of information. It was probably too overwhelming. I actually looked at their terms of reference and also the [department's] terms of reference of what maladministration and corrupt conduct was. It was border line on corrupt conduct but not administration. I thought we had reasonable grounds there, especially when there was lots of evidence to substantiate what I was saying.*
>
> *I would have liked a lot more independent advice about how I should approach [the corruption commission] from some other people who had been through similar hoops, to say well go down this direction, it may not work but this is the way you should present your material.* (Doug)

Anna's view was quite similar:

> *It is quite complicated and I just wonder if … it does just become too complicated for the [accountability agency] people… I know when I was doing responses to all of the investigations, you know some of the responses were fifty pages. Reading through it, people get bored with that. I often think that the people who were deciding my future, I think they would have switched off very quickly when they were reading all of the reports. It was too detailed and people don't have time to read these reports…* (Anna)

Dennis also believed that the accountability agency had not fully comprehended the detail of his report of wrongdoing, but he was at least content that he had somewhere to go outside his department despite the lack of investigative outcome:

> *The Ombudsman's office … they did an excellent job. They were a sounding board. And it was more like having put stuff on the record, needing to get stuff on the record, needing to put stuff out there at an early stage… The Ombudsman's office didn't in some instances understand. You'd go through this problem… and they would retain maybe a third of what you were talking to them about. And sometimes*

> *they just wouldn't even understand the basic drafts of it… [but] they took things into account at least.* (Dennis)

It is perhaps understandable, though nonetheless regrettable, that a department might attempt to dismiss or diminish a complaint out of defensiveness. It is clearly even more problematic if indeed accountability agency assessments cannot encompass complexity and extensive detail, since by the time many whistleblowers get to the stage of reporting externally their matters are inevitably complex. This is clearly one aspect of their experience that explains a whistleblower's dissatisfaction with an accountability agency. However, even when investigative action is taken, there are issues of concern to whistleblowers, as the next section demonstrates.

## Accountability agency investigations

An accountability agency had taken direct investigative action in very few cases of those whistleblowers surveyed and/or interviewed. These investigations were not necessarily viewed in a positive light, with either the quality of the investigators or the direction of the investigation being seen to be insufficient, particularly by managers and case-handlers. As Margaret Mitchell states:

> *Proper investigation of workplace complaints and concerns is a cornerstone of the practical implementation of whistleblowing legislation, resulting in reports being dealt with appropriately and the facts of the situation discovered.* (Mitchell 2008:181)

Mitchell goes on to summarise investigating as being fundamentally a 'fact-finding process' involving gathering information and preparing a report for action. The judgement and reasoning that are an essential part of an investigation are evident in the following detailed description.

> *…the examination, study, searching, tracking and gathering of factual information that answers questions or solves problems [and] a comprehensive activity involving information collection, the application of logic, and the exercise of sound reasoning.* (Sennewald cited in Mitchell 2008:182)

Accountability agencies can investigate allegations of wrongdoing by undertaking this process themselves. These investigations involve the use of considerable formal powers such as the production of documents or even Royal Commission style powers to compel witnesses to give evidence under oath. These investigations result in formal reports that

comply with the principles of natural justice, not least to ensure impartial decisions are made and that all parties are given an opportunity to be heard. Far more frequently, accountability agencies make informal inquiries by contacting departments in writing or by telephone. They then make judgements about the facts and explanations that are provided by departments and decide, on the balance of probabilities, where the truth lies. No formal reports are required in these circumstances. Both formal and informal investigative action is included in the following analysis.

The Manager and Case-handler Surveys and interviews included a question about what could be improved to ensure more frequent reporting of wrongdoing and a more effective response. As the three survey respondents quoted below indicate, support for external investigations was strongly focused on the impartiality that external agencies could bring to an investigation. One wrote:

> *External investigation [is] impartial – HR not reliable.*

Another warned:

> *Ensure that the organisation does not conduct the investigation. Should be external.*

The third recommended:

> *An external body to deal with all incidents of wrongdoing in the workplace.*

Another point of view was that external investigation was essential when the alleged wrongdoers were senior officers of the department:

> *The most challenging issues for employees is to report wrongdoing by bosses. While we have relatively good internal audit/fraud procedures in place, it requires an external group to investigate more senior executives.* (Manager_4_NSW)

A number of managers and case-handlers indicated that external accountability agencies simply should take on more responsibility for investigations:

> *[Corruption commission] to take a more active role instead of passing the buck down to internal audit units.* (Manager_2_Qld)

> *Agencies such as [corruption commission] investigate more matters (currently about two per cent).* (Manager_8_NSW)

Some had reservations:

> *More audits from [corruption commission], ombudsman – not entirely satisfactory but little else available.* (Manager_5_NSW)

Although many managers and case-handlers, as well as whistleblowers, acknowledged the importance of having external oversight, others were highly critical of the role of external accountability agencies. It is not possible to tell from the survey responses whether the respondent had actual experience of dealing with an accountability agency, but it is at least possible that the idea of external accountability is upheld in principle, while the actual experience of dealing with such agencies is less palatable. Criticisms of the accountability agencies investigative processes were threefold: the quality and the focus of investigative action and the length of time taken by accountability agencies to complete investigations and deliver determinations on the outcomes.

### *Quality of investigators and investigations*

Several managers and case-handlers expressed the view that accountability agency investigators should be highly qualified and competent because of the authority invested in the watchdog agency:

> *One would hope, given the people who actually spoke to us from the integrity agency and their background in police or legal matter… that they would have some more experience than we have.* (Case-handler_1_WA)

They were not all confident that this was the case:

> *Because we create organisations we think that they're going to stock them with good people.* (Manager_1_WA)

In some cases, managers explicitly called into question the experience and capacity of accountability agency investigators, with the need for what one departmental manager called '*greater skill sets for investigators'* located in accountability agencies:

> *Every time there was a complaint [accountability agency investigators] would say, what do you think about this? I would say, well why don't we do some investigations first to find out. In many instances, in my view, they already had an opinion before they did an investigation…The balance and quality and experience of the investigators, say in the ombudsman, is questionable. [Corruption commission] is the same.* (Manager_1_WA)

Managers made negative observations about the standard of professionalism exhibited by accountability agency investigators:

> *From what I've seen of other agencies' investigation methods – I won't go there, but my one and only encounter of it, I thought it wasn't very professional at all.* (Manager_2_WA)

They criticised the quality of investigative methods. One manager stated:

> *But at the end of the day, wherever you send an enquiry, you better send it to an experienced investigator… If they're experienced investigators, they will tell you what the evidence is, not what someone wants them to think… the quality of some of these enquiries is highly questionable and I think you should make the people much more accountable for what they say and do.'* (Manager_1_WA)

Two whistleblowers also talked explicitly about their negative experiences with accountability agency investigators. Josie's criticism centred on the investigative process:

> *I just expected to be informed of what was going to happen. I expected to be able to put my side across before these other people were even interviewed… that's the other thing that really hurt too was we were very aware of people being pulled off the floor to be interviewed by the investigator. It was quite obvious, even though it was meant to be kept hush hush.* (Josie)

Kim's team initially had dealings with a specialist investigative agency. While this agency was investigating a protected disclosure it is not, strictly speaking, within the scope of this analysis, but Kim's observations nicely illustrate the need for well trained and disciplined investigators:

> *When the [external oversight agency] came out, such a disorderly mob I've never seen in all my life… In their meeting with us – the first meeting – we had them… we actually managed to get them fighting with each other which was really … I thought was pretty impressive actually…… we didn't do it deliberately. We asked one something and they said, oh this is the way it's going to be. Then another person in the group then started disagreeing with it in front of us… They'd obviously not had a briefing before – all of them – the team – before they got there because there were disagreements.*

To Kim's team it did not even appear that the investigators were serious about what they were investigating:

> *We actually bet them to investigate individual cases and they refused. They were 'looking at people's stories'.*

By contrast, Kim's dealings with a corruption commission were much more positive:

> *The [corruption commission] investigation of all the allegations was very fair and I had my chance to say what I felt.* (Kim)

The importance of accountability agencies employing professional, well-trained and competent investigators cannot be overstated. It is important for the reputation of the agency that its representatives reflect the best of the agency, but it is also essential given because these investigators can exercise extensive coercive investigative powers.

### *Focus of investigations*

Mangers and case-handlers also criticised the focus of accountability agencies' investigative activities. One manager epitomised this criticism with the following comment:

> *The ombudsman should be reminded that the whole complaint process is a [state] strategy and policy. The oversight is often heavy handed and not focused on the real or identified issues.* (Manager_9_NSW)

Another commented on the difficulties that accountability agency's investigative techniques could create for ensuing legal processes:

> *Without being critical of the [corruption commission] they conduct their investigations differently to us… Their lines of inquiry … are for their own purposes. Then when they finish and hand that over to us, it's difficult, it can be difficult for us to align that to criminal matters to whatever it is that we might want to then pursue… that's just the technical issue because we would question people differently….their lines of questioning might be for the answers that they're seeking but often we would want to ask more along a line of inquiry … a lot of time their line of questioning leaves you thinking oh well you could have asked this question, you could have asked a lot more questions.[Interviewer: So it's got quite a narrow focus?] Sometimes it can have, yes. They'll pick on a certain thing that they're looking at, but that's their charter... so their line of inquiry might differ to what ours might.* (Manager_1_NSW)

As discussed above, external accountability agencies rely on their capacity for increasingly intrusive and coercive investigations in cases where a department's 'distributed integrity' systems prove insufficient. Clear and technically competent investigations are essential when these agencies do step in.

### *Delays*

The timeliness of responses to reports of wrongdoing – including preliminary assessments as well as investigations and reports on outcomes – is important for whistleblowers and departments under investigation.

Smith and Brown, reporting on the WWTW data, estimate that about 62 per cent of whistleblowers suffer some level of increased stress. This is corroborated by the views of some 91 per cent of managers and case-handlers that whistleblowers experienced problems as a result of their reporting (Smith and Brown 2008:134). Speeding up the process, and thereby minimising the time and uncertainty involved in this experience, might well have a positive impact on what is clearly a stressful activity. While whistleblowers who were interviewed complained about delays by departments, there were no specific complaints about the length of time taken by accountability agencies to finalise investigative action. The only specific comment was by Robert, commenting on how long it had taken to have his complaint recognised as a protected disclosure:

> *But the, my appeal process went for about two years to challenge this. Up to a point where I had exhausted all of my available avenues. I'd gone through the [public sector employment body], who believed that they didn't have a role because this was a disciplinary matter. I complained to the Equal Opportunities Commission, without having success because they also believed that there wasn't anything that they could act on, it wasn't discrimination, and so on. So, in frustration, I went to the Office of the State Ombudsman, and the Office of the State Ombudsman agreed to investigate this. But they determined that the best way for them to deal with this was to deal with it as a public interest disclosure complaint.*
>
> *Now the State Ombudsman accepted that in about, I think it was about October 2006, and then in about August, September 2007 I was advised by the State Ombudsman that the two actions had been taken against me.* (Robert)

The absence of complaint by whistleblowers may be due to relief that some investigation is occurring. For those who approach accountability agencies, their attempts to have matters resolved internally may have continued for many months or even years, so a few additional months may not seem too much of a burden if a positive outcome might be achieved. For departments, however, the length of time taken clearly has serious impacts on the management not only of the disclosure and the

whistleblower, but also ongoing core functions. The delays experienced once external accountability agencies become involved in the investigation of reports of wrongdoing were the subject of quite extensive criticism by managers and case-handlers. It is one of the significant sources of contention between departments and accountability agencies.

Managers and case-handlers were asked two survey questions about the most important things that could be changed both inside and outside their own departments to ensure wrongdoing would be reported more often and dealt with more effectively (WWTW Manager and Case-handler Surveys: questions 63 and 64). The timeliness of action by external accountability agencies was one of those things. Two made general observations:

> *Speed up investigations by outside agencies significantly.*
>
> *More timely external investigations. They always take too long.*

Another identified the integrity of evidence as a reason for quick investigation:

> *The guarantee that the whistleblower and alleged wrongdoers present all relevant information to an officer of 'judicial' qualifications and both parties be interviewed within 30 days – so that the process of destroying and tampering of evidence is minimised.*

Others referred to the need for more, and quicker, feedback to reduce uncertainty:

> *Feedback more often from external agencies at the process. Sometimes it can take years without any feedback until the final conclusion. It creates an air of uncertainty.*
>
> *Watchdog agencies complete the investigation/review activity in reasonable (short) timeframe – currently month/years of waiting for their 'verdict'.*

Managers and case-handlers also raised this issue during interviews. Two focused on the increased complexity that could result from lengthy processes:

> *If we can actually deal with things in-house then it's dealt with in a more timely fashion… whereas if we have to involve external agencies it then becomes more protracted and then of course the net is cast wider.* (Manager_6_WA)
>
> *I firmly believe timeliness is the best approach. If things are left to go for too long then they go completely out of control and can't be managed.* (Case-handler_3_WA)

Another manager pointed to the waste of time and resources:

> *My experience with the [corruption commission] has been that they take so long to conclude their investigation. Because they have quite a high turnover of staff or investigators or whatever you want to call them, there seems to be no continuity. You know you'll get one person who will start off. Then you get somebody else. Then they have to come back at you and ask you the same old questions again and again. That can be quite frustrating. For me that is time wasting. I think we need to get onto it as soon as possible, do the investigation, make the recommendations, move on and not have this stuff hanging around your head for six or eight months' ... it took us over eight months to get it sorted because of all these changes out in the corruption commission.*

The same manager was also clear about the ramifications of delay for staff under investigation:

> *It made it very uncomfortable for the staff that did report. What we ended up doing was finding them a job in another area in the organisation…. It must be awful for anybody to have an allegation made against them, if it's dragged out for a lengthy period of time… they just need to know that the issue has been dealt with and we can move on.* (Manager_6_WA)

Departments need to have external investigative processes finalised in order to minimise disruption to the organisation. For investigative purposes, delays almost inevitably lead to increased difficulties in finding reliable evidence and limits on the possibilities of corrective action. Delays on the part of accountability agencies may well be the result of insufficient resourcing (see discussion above) but it is problematic for an accountability relationship if departments view these agencies as being less able to deal efficiently with investigations than they are themselves.

## Distributed integrity in practice

The second set of problems arises from the investigative practices of accountability agencies. Three elements of these practices were the subject of trenchant criticism from whistleblowers, managers and case-handlers. Problems arising from the length of time taken by accountability agencies to reach an outcome have already been discussed. The other two practices are the referral of responsibility for investigating back to departments and the manner with which confidentiality is dealt.

## Referrals back to departments

As noted above, managers and case-handlers, as well as whistleblowers, indicated their belief in the importance of having an impartial and independent external agency capable of investigating wrongdoing. One manager commented as follows:

> *A few of us have sort of talked about it and the only people you could really go to now would be [an external accountability agency]. If you really had a problem you'd have to go the whole hog and bring someone independent in. Whether they'd let us do that is something else… I think that a really important complaint should be dealt with by an outside [agency]. There wouldn't be the hierarchy protecting the other hierarchy… if it was an outside person they wouldn't care less. They might not ring him up and say you'd better watch your back because all these people are talking against you.* (Manager_10_NSW)

This independent assessment of allegations, and in some cases, departmental responses, is what whistleblowers also seek. This fresh assessment was what Frank valued about the ombudsman's response to his allegations:

> *What I think is that the senior management simply stand shoulder to shoulder. Even if someone has done something obviously wrong they will shoot the messenger rather than do something about the problem …Well, the ombudsman's role: they could obviously see that there were lots of things wrong. The information [the unit] gave the ombudsman is the same information they gave the department, and the ombudsman's office could see that yes, this was a problem.* (Frank)

What is evident from these comments is that the independence of the external oversight body is valued. Managers and case-handlers viewed the practice of referring some, if not most, allegations back to departments, either for clarification of issues and the determination of jurisdiction as part of the assessment process, or in fact for full investigation, as curtailing the impact of this independence. The reliance on 'distributed integrity', including departmental investigations is, as has already been discussed, a practice common to most accountability agencies.

The NSW Ombudsman explains the process and its usefulness in the following way:

> *We work closely with many organisations and individuals to help them identify strengths and weaknesses in their systems and performance, find solutions and implement practical and effective reform.* (NSW Ombudsman Annual Report 2002-03:3)

From the point of view of an external investigation agency, this strategy is also essential for obtaining information to supplement that provided by a complainant:

> *We made preliminary inquiries or informal investigations into 628 out of the 1,304 complaints finalised this year that were within jurisdiction. These preliminary inquiries often involve numerous phone calls and letter as well as meetings and negotiations with staff from the agency concerned.*
>
> *Sometimes our inquiries show there is little or no evidence of any wrong conduct or that pursuing the matter would not produce any practical outcome in the public interest. In these cases, we conclude the matter and close the file. On the other hand, if we are not satisfied with the agency's response, particularly if they have failed to address our concerns about serious or systemic issues, we may escalate the matter and use our formal investigative powers.* (NSW Ombudsman Annual Report 2002-03:25)

Whistleblowers are not, however, in the same situation as general complaints to accountability agencies. As already discussed, two of the main reasons for whistleblowers approaching an external accountability agency are that they believe their own department has not properly investigated the allegations they have made, or that the responsible manager or executive has decided not to take appropriate action despite the findings of an internal investigation. In this context it is not surprising that most whistleblowers expect accountability agencies to investigate the allegations directly using their extensive investigative powers, thereby ensuring an independent inquiry, findings and recommended action.

Not all whistleblowers were unaware of accountability agencies' reliance on departmental inquiries. It was enough to stop Eve from involving an external accountability agency:

> *Didn't go to the [corruption commission]. I guess I just didn't think that anybody was going to, you know, look at this seriously. I thought that any – if I'd taken it to the [corruption commission] they just would have referred it back to the executive and they would have just said oh look this is a personality conflict and nothing more.* (Eve)

For Sharon, however, it was a complete surprise:

> *I thought the [corruption commission] would – I didn't actually realise they'd defer it back to the department. I thought that they would do an investigation themselves, that it would be an independent thing. I didn't*

> *realise that part of their whole process was to, whatever they call it – devolution – and put it back to the department, which just seemed ridiculous to me. They are investigating their own... they are investigating themselves and of course not finding anything wrong with what they were doing.* (Sharon)

None of the whistleblowers interviewed as part of this study had had their allegations directly investigated by an accountability agency. A respondent to the Manager Survey confirmed the frequency of this approach to dealing with reports:

> *My experience is that, generally [external accountability agencies] refer it to us. They'll monitor it and monitor the outcome and they may be a little more interested in it than possibly something that we've notified them about that's come through us. But essentially it's very rare for them to investigate.* (Manager_2_NSW)

The limitations of this approach to investigating allegations were a common theme for nearly all whistleblowers who had approached an external accountability agency. The general view, like Sharon's, was that it simply allowed departments to continue to cover up wrongdoing. As one respondent to the Internal Witness Survey wrote:

> *I reported maladministration and discriminating employment practices. Internally the organisation covered up the problem. I then reported many policy breaches to the ... ombudsman. The investigation was returned to [the department] to complete. The result was more cover up and I have been ostracised and bullied ever since. Previously I was held in high regard by management and staff.* (Survey respondent)

Doug too indicated that he believed the corruption commission to have placed too much reliance on the integrity of the department about which he lodged his complaint:

> *I put the application to [a corruption commission]; they requested that I sign a declaration saying I had no problem that they were to contact [the department], which was a mistake. Because the first thing [the department] did was find out and they put a different spin on things and so [a corruption commission] backed off.* (Doug)

The accountability agencies' reliance on a department's own assessment of the reported conduct in some cases seems just to allow the department to discredit the whistleblower who has taken steps for an independent assessment and investigation of alleged wrongdoing. Without details of the grounds on which the accountability agency has concurred with the department's view, it is impossible for whistleblowers to be sure that the accountability agency is just not interested in pursuing the allegations and has taken

the department's side. These details were not given to Doug or Kim. Kim made a report to a corruption commission about fraud being committed in her workplace by a senior officer and the lack of departmental action:

> *I eventually got a letter back from the [corruption commission] to say that really there hadn't been any adverse findings against the management [of the department] and how they'd managed him… I've never been told [of any final outcome] nor given any explanation of their finding.* (Kim)

Cliff's experience was quite similar:

> *I raised the matter with management several times. No action was taken. My only recourse was to go higher so I went to the [corruption commission]. It went as far as the director in my local employment area because nothing was done. It went to the [corruption commission] and they couldn't handle it because no official complaint had been made by the … department concerning any of the things that I had raised. They couldn't handle it. So they sent me to the Ethical Standards section of the … department, who completely white-washed the whole thing.* (Cliff)

Sharon's complaint was about internal investigative processes but even this was forwarded to the department, with the corruption commission seemingly just endorsing the department's handling of the matter:

> *So I then sent that letter [saying the department would not investigate her allegations] to the [corruption commission] to say well I don't necessarily think that the internal processes of investigation are going to work because this is the letter that I have got back. [The corruption commission] stopped it before it's even started. The [corruption commission's] response was, well we forwarded that letter on to the ethical standards unit in [the department] who are handling the investigation. So that's where it stands.* (Sharon)

Frank was clear about the difference between relying on departments to investigate and an external accountability agency directly investigating a report of wrongdoing:

> *Unless it is under whichever section it is… where it's a formal investigation where people are subpoenaed, they give evidence under oath and then the findings of that go to the minister and the minister can be requested to give evidence… then the findings of that investigation go to parliament and then they are in the public arena. So I think if it gets to that stage the department could be severely embarrassed by all of this…*
>
> *In [the department] they're just looking after themselves whereas the ombudsman's office I think has a lot more integrity. It's their job to*

> *look into this where I think the management of [the department] think it's their job to protect their own arses and protect the arses of other senior management… the only time anything's ever been done about anything is when the investigations are external through the office of the ombudsman…*
>
> *The office of the ombudsman has been very good but unless it's formal and someone is actually going to suffer a consequence then I think the department is going to do nothing.* (Frank)

Two managers from different departments made similar observations about the likelihood of departments presenting their own interpretation of the allegations. One said:

> *You'd hope that it would be different, that it was more thorough when an external agency asks for information … but I think it's not necessarily more thorough, it's just that the organisation tries to present the information in a way that puts us in a good light.* (Manager_3_Qld)

The other commented on the circularity of the process:

> *They simply asked for a report from the [work unit] which goes to the chief executive who in turn gives it back to the executive director in charge of the issue to do the report, goes back to the CE, they sign off and it goes to [external accountability agency] so no I don't think it's fully investigated and I don't think it has a different outcome… For it to have a different outcome the [external agency] would need to go down to the organisation and actually interview the people involved rather than just get one report that comes from the CE which is prepared by the person who is involved in the complaint.* (Case-handler_2_WA)

One department involved in this study had developed a reporting procedure that anticipated whistleblowers going to the ombudsman and ensured that the department's view had already been made known:

> *If we receive a complaint we send it to [the ombudsman] anyway even though they've said to us why are you sending it? Well we send it anyway just to be above board, to say here is the report, this is the way it was conducted. We do that because if [the reporter] is not satisfied with the internal, they'll go to that external organisation. So if they go back to the ombudsman they're already aware of the situation… maybe they can hit the ground running when they get the complaint.* (Manager_11_NSW)

The danger in this, of course, is that the department's view, putting itself in a good light, is given pre-eminence. Another manager noted this possibility:

> *No matter where you go [in the department] they always protect their own and the higher up. So you then have to go sometimes outside and then [a corruption commission] can't deal with it, Ombudsman can't deal with it and then [the public sector employment agency] who could deal with it just went [the department's] way.* (Manager_1_Qld)

Unless accountability agencies dedicate resources and skilled investigators to ensure thorough and detailed assessment of departmental reports, particularly of whistleblowers' disclosures, it cannot be said that they are ensuring the proper investigation of disclosures as was envisaged under the legislation in each jurisdiction. Reliance on 'distributed integrity' has to be underpinned by the capacity and willingness to employ more formal, possibly coercive, powers (Braithwaite 1998, Mulgan 2003).

Several departmental managers and case-handlers commented specifically on the process in response to the survey question about the most important thing that could be changed to improve improving management of whistleblowing outside their department. Two respondents were clear about the need for more active involvement by accountability agencies:

> *More supervision/[corruption commission] involvement in a confidential matter.*

> *Haven't observed any outside agency intervention as yet.*

Other respondents commented more particularly on the lack of direct investigative action by accountability agencies:

> *[Corruption commission] to take a more active role instead of passing the buck down to internal audit units.*

> *[Corruption commission] tends not to take on many cases and refers them to the employing agency.*

Another respondent indicated a view that this procedure allowed accountability agencies to do nothing except criticise departments:

> *More 'buy in' early on from watchdogs. They seem to want to sit back and then when it's all over be critical.*

Yet another respondent was alert to the surprise and disappoint expressed by whistleblowers about their realisation that accountability agencies were not going to directly investigate their disclosures:

> *Information about and marketing of outside 'bodies' to whom the matter can be reported. However, often these 'outside bodies' assess the report and then hand it back to this organisation to be reinvestigated. During that process the person lodging the report can feel quite betrayed.*

It is clear from these responses that some managers and case-handlers, as well as whistleblowers, view the 'referral back' practice as accountability agencies failing to take responsibility for investigations and thereby providing too limited a response to whistleblowers' disclosures. On the other hand, some managers and case-handlers criticised the heavy-handedness of external accountability agencies and their interference in what was determined as departmental responsibilities:

> *Remove the [corruption commission's] perception that all activity is suspicious or corrupt and get them focused on real corruption.* (Manager_3_WA)

Another manager was quite strident:

> *The vast majority of issues are best dealt with internally. Orgs like [corruption commission] should stop wasting our available resources dealing with pedantic process related issues that don't impact outcomes so we use these resources effectively to prevent red issues arising. The actions of [corruption commission] are such that they are intrusive upon appropriate exercise of discretion in relation to issues they don't fully understand. They act more like 'Big Brother' trying to catch people out rather than focussing on areas of real problems, or assisting to support and improve.*
>
> *External orgs have a role in serious issues but not day to day workplace issues. External orgs need to identify and focus on seriousness, not turn Govt workplaces into the next best thing to a police state. This is intimidating and threatening to employees and more likely to result in the non-reporting of issues fixed and resolved, not to get the other person into trouble. The [corruption commission] reporting obligations and their practices are a huge disincentive to issues being reported.* (Manager_4_WA)

The strength of the criticism can be explained in part by departments being protective of their own jurisdictions and resistant to oversight. There is, however, clearly a need for better communication between external accountability agencies and the departments

they oversight, both about the overall focus of investigative and oversight activity, as well as any specific investigative approach. Confidentiality is another issue which would benefit from improved communication between departments and accountability agencies, and this is dealt with in the next section.

## Confidentiality

Brown, Latimer, McMillan and Wheeler identify confidentiality as one of the key principles of best practice whistleblowing legislation:

> *Disclosures should be received and investigated in private, so as to safeguard the identity of a person making a disclosure to the maximum extent possible within the agency's control. Avenues should be available for disclosures to be made confidentially and, where practical, individual disclosures should be dealt with in ways that do not disclose the identity of the person making the disclosure, and preferably even that a disclosure has in fact been made. This principle is subject to the need to disclose a person's identity to other parties – for example, when this is absolutely necessary to facilitate the effective investigation of a disclosure, provide procedural fairness, protect a person who has made a disclosure or make a public report on how a disclosure was dealt with.* (Brown *et al* 2008:285)

Legislation in each of the jurisdictions under review provide for the confidentiality of the whistleblower in some way. In New South Wales and Western Australia, the whistleblower's consent needs to be sought, in other than exceptional circumstances, before his or her identity is revealed to anyone. In Queensland, the confidentiality provisions are less stringent. The receiving agency is required to assess whether the disclosure of identity would result in an unacceptable risk of reprisal against the whistleblower, and only if such risk is identified, and it is practicable, is the agency required to consult with the whistleblower.

This level of consultation was not afforded to all whistleblowers in this study. For example, Doug submitted his complaint to an ombudsman's office. He had no recollection, despite his extensive paperwork, of being asked by the ombudsman's office for his consent to them approaching the department. It appeared that they did:

> *I think they got in touch with the Assistant Director of Audit from [the department] as far as I'm aware, but they didn't actually disclose too much…*

During his interview, Doug read from the letter he received from the ombudsman's office:

> *'I've made inquiries into the matter to determine whether or not your complaint was considered to be a protected disclosure within the meaning of the Act'. They actually gave a description of what they considered to be a protected disclosure. 'There is insufficient evidence for corrupt conduct maladministration or serious waste to warrant an audit or investigation'.*
>
> *So they then went back to ... the auditor within [the department] and said that well, it should be handled within [the department]. So effectively, they considered it didn't meet their references of being a protected disclosure, so it was all out in the open, and they said, well now it has to be handled within [the department] ...'On the basis of the issues raised, it is considered more appropriate that the [work unit] deals with the matter in accordance with the department's policy '... They said, 'I have had made inquiries both with the audit section and with [Doug's work unit] about the progress of the matter'. So they've been talking to management, because they consider it not a protected disclosure, so it was all out in the open. I'd been flushed out.* (Doug)

The revelation of a whistleblower's identity, once he or she is determined not to be making a protected disclosure within the terms of the relevant legislation, is clearly problematic. He or she may not have been making a disclosure that fell within the legal definitions, and he or she is then without any whistleblower protection or legal remedy. Doug ended up leaving the department because of the untenable position he found himself in.

Disclosure of a whistleblower's identity during investigative processes was confirmed by three managers and case-handlers who were interviewed. Two indicated that it was an almost inevitable part of the process:

> *When you go to an external integrity agency they write back to the organisation... so they are still found out so I don't believe it makes a lot of difference unless their confidentiality or their identity is withheld and they can't really do that because they're investigating a certain issue.* (Case-handler_4_WA)

> *Even before the actual ombudsman interviews happened, or while they were sort of halfway through, people knew who the whistleblowers were.* (Manager_10_NSW)

The third manager observed that disclosure of identity was often due to carelessness:

> *I've dealt with a number of protected disclosures and ... what concerns me the most about it is that often the name of the person making the protected disclosure is disclosed to people involved in the investigation by mistake. So I'm very concerned about the organisation's ability to really protect somebody that's making an allegation.* (Manager_18_NSW)

Accountability agencies generally advise whistleblowers not to talk about their disclosure in order to limit the number of people who become aware of it (see for example the NSW Ombudsman *Protected Disclosure Guidelines*). This is, however, something of a double bind since the legislative framework confirms the importance of departments having the opportunity to resolve their own integrity breaches and departmental procedures encourage whistleblowers to report initially to their own department. In some cases, the department itself breaches a whistleblower's confidentiality:

> *This person ... felt that they were being protected by making a protected disclosure ... but the information was given to the [work area] anyway. I didn't pass that onto anyone but that should never have occurred. So they weren't given the level of confidentiality that they believed, or anonymity that they believed they were getting.* (Manager_18_NSW)

Some managers and case-handlers believed that confidentiality was a clear benefit of using external accountability agencies, not only for the whistleblower but also for investigative purposes:

> *The external agency ... will raise issues that perhaps the organisation doesn't see because people are interviewed confidentially so they're more forthcoming with information.* (Case-handler_4_WA)

In addition to holding confidential interviews, accountability agencies, particularly corruption commissions, can investigate quite discreetly without necessarily alerting departmental staff to the disclosure of wrongdoing:

> *They are better able to keep confidential the nature of the complaint and the complainant or the whistleblower. The reason I say that is because they've got the ability to do things like financial checking and all of those things that can be done, whereas we often have to go into the work unit or we have to find the records... they can do a better prelim and get a much higher level of data and therefore there's less likelihood of exposing the complainant.* (Manager_19_NSW)

For others, however, the way accountability agencies protected confidentiality by providing very limited identifying information was seen as hampering any possibility of sufficient investigation by the department. The head of an internal investigation unit was explicit about the problems caused by an accountability agency's lack of trust in the department:

> *I think there is significant confusion, even in agencies that are largely responsible for the protected disclosure legislation about the difference between confidentiality and detrimental action…*
> *So, for example, if a complaint comes into [the corruption commission] they decide that they don't want to do anything about it because it doesn't really meet their criteria, but they believe we, as a department, should be doing something about it. And if they've assessed it as the person getting protected disclosure status, they will send the complaint to us, rewritten and not tell us who the person is who has made the disclosure.*

The manager identified two practical problems arising from this procedure:

> *That can be significantly problematic in an investigation for a number of reasons. Firstly, often the complaint is quite broadly generic and you actually need to be able to go back to the complainant to clarify the complaint to start your investigation. So you've got problems even assessing the complaint or knowing where to start your investigation in some circumstances. Secondly, sometimes it is a complainant who has made the same complaint and it is clearly the same complaint that you've had numerous times, perhaps with a slightly different edge to it. And if you at least knew as a senior officer who the complainant was, and knew that it was the same complainant who'd been complaining constantly you may be able to deal with the matter in a different way.* (Manager_1_NSW)

The legislation in each jurisdiction has provisions that allow for the release of a whistleblower's identity should it be necessary for the investigation of a public interest disclosure. The provisions were clearly not used in the situations described above. The manager was asked if an accountability agency had sought consent from any whistleblower to release identifying details. The manager responded that '*they haven't to the best of my knowledge*':

> *But the [corruption commission] refuses to give us that information, presumably with the fear of detrimental action and that causes some significant problems. My understanding is that, in certain circumstances, you do have to make the complainant's name available because it may be the only way that you can actually put fairly serious allegations to someone.* (Manager_1_NSW)

This manager also observed that rigid adherence to confidentiality provisions could have negative consequences for whistleblowers:

> *I think the other problem is the whole confidentiality issue, where everyone, including the complainant, if they've made themselves known, is counselled to keep things confidential. And while I think that's very important for the integrity of the investigation I think it often leaves people out on a limb.* (Manager_1_NSW)

The isolation that can result from interpreting confidentiality provisions very strictly was confirmed by Karen. It enabled the alleged wrongdoer to make life very difficult for her and the colleague who made the disclosure with her:

> *We were given the status of the disclosure which actually ultimately worked against us. It was a small [workplace] and there were only four staff and one secretary and it wasn't hard for him to figure out who had blown the whistle… We weren't allowed to mention to him or anybody else what was going on. And that allowed him to do all sorts of things without us being able to say anything to him about it…We weren't sure who we were supposed to tell … The guidelines [gave] no indication of who we were supposed to report to if anything happened, which made it rather difficult… Even when I went to my counsellor, I didn't really know what I could say to her.* (Karen)

Protecting the confidentiality of whistleblowers is clearly difficult. Sufficient care has to be taken to ensure a whistleblower's identity is not released, either without his or her knowledge or in error, thereby putting them at risk of reprisals. On the other hand, too rigid an adherence to the protection of identity can both limit the possibility of effective investigation and leave the whistleblower extremely isolated at a time of high stress. Clear interpretation and careful application of the legislation would resolve the obvious problems identified above.

## Coordinated oversight

As noted earlier in Chapter 4, there are arrangements in place in each jurisdiction to facilitate the process of referral between accountability agencies. These arrangements are intended to ensure there is no duplicated investigation and to assist whistleblowers in having their matters heard by the appropriate accountability agency. Sampford *et al* refer to these arrangements as intending to bring 'operational coherence' between 'multiple integrity actors'. They note however that where these arrangements are

informal, as in Queensland and New South Wales, they enable cooperation but do not require it (Sampford, Smith and Brown 2005:103).

Anna, whose matter was dealt with through industrial proceedings and not taken up by any accountability agency, provides an example of one way in which accountability agencies deal with a matter deemed not to be within their jurisdiction. Referring matters in this way is not necessarily problematic and is indeed even essential for ensuring coherence between the various accountability agencies. It does, however, require 'deliberate coordinating strategies' (Sampford, Smith and Brown 2005:97).

Where proper coordination fails, the referrals between agencies can result in a completely circular process. This was another aspect of Anna's experience with accountability agencies:

> *I rang the investigations unit [of the department]… I spoke to the head of that … he said try the Ombudsman's office first. They referred me to the Ombudsman's Office. So I went through the whole story with them, and I submitted my complaint. Their senior investigator wrote back and said no, the most appropriate place to go is the department. I did lodge it with the department but it went nowhere … again because it became an IRC matter. They didn't get involved.* (Anna)

Anna's case ended up in the Industrial Relations Commission because of the reprisals she experienced as a result of reporting wrongdoing by the chief executive of her department. As noted above, no accountability agency looked beyond this process to examine the conduct of the chief executive and her original allegations.

Other whistleblowers talked about similar experiences. Josie, for example, said:

> *I used both the [public sector employment body] and the ombudsman. The [public sector employment body] certainly recognised the breach in the standards as far as natural justice was concerned. The ombudsman really just referred me back to the [public sector employment body] saying that I needed to go through there, that they did recognise something was amiss.* (Josie)

Josie's report of wrongdoing was never fully investigated, despite her attempts to make contact with the 'right' accountability agency.

Doug said that he got the following response some six or seven weeks after he made his initial report:

> *[The corruption commission] came back and said my concerns related to breaches of policies, procedures, administration so they handballed me to the ombudsman. They said if I wanted to go any further perhaps I'd better make an application to the ombudsman…the ombudsman then says well it had to be handled within [the department]. You'd better take your concerns back to [the department], to the director and get them to handle it. It was going around in never ending circles.* (Doug)

It is not clear that whistleblowers are aware of the coordinating arrangements when they make their disclosures. Some sidestep the referral of matters between accountability agencies choosing to make formal disclosures to a number of them. Colin did this because of the slow response of the corruption commission to which he had made the initial disclosure:

> *I rang [the corruption commission] and asked what had happened because I had made a complaint by then to the ombudsman. And he said 'well it came back to me and they said you had retired or resigned' so therefore they had let it go. Then the ombudsman said well there wasn't a matter for them to answer, there was no evidence of corruption so that was the end of it. I still haven't heard from the [the corruption commission] other than phone calls asking whether I'd resigned or retired.* (Colin)

In addition to his surprise that the corruption commission had taken the department's word about his employment status at face value and had let his complaint drop (even though protection extends to former employees), Colin was startled by the different assessments of his matter by the two accountability agencies:

> *What I really couldn't understand was the [the corruption commission] were telling me it was a protected disclosure and I had the ombudsman telling me no, it isn't therefore we can't act on your claim of detrimental action. And I've heard nothing more.* (Colin)

It seems that, in these cases, the system of cooperation and coordination between accountability agencies failed completely. There was not even a consistent decision about the status of Colin's disclosure. The inconsistent assessment of the status of whistleblower reports and the failure of any agency to investigate the disclosure may not be frequent, but the consequences for whistleblowers are serious. The inconsistent assessment of Colin's disclosure was based on agencies interpreting the 'public interest' differently. When a difference of interpretation can leave a whistleblower in a potentially perilous situation without recourse to even the limited protection afforded by

the legislation, it indicates an administrative failure in coordination and a weakness in the legislation itself.

## Conclusions

The purpose of accountability agencies being given jurisdiction over allegations made by whistleblowers is to ensure that there is an impartial, professional body with significant powers of investigation and reporting who can assess, investigate and report as appropriate. Whistleblowers are in this way provided with a legal alternative to having departments deal with their allegations, limiting the possibility of wrongdoing simply being covered up or ignored. The role of accountability agencies is to ensure the integrity of responses to allegations, and the protection of the whistleblowers. What is evident is that accountability agencies have not developed any particular strategies for dealing with whistleblowers and rely on their usual practices for investigating allegations of wrongdoing. In doing so, they do fail to achieve the aims of the legislation.

It has been established in Chapter 5 that whistleblowers generally make approaches to external agencies only when their trust in, and loyalty to, their employer has already been breached. In order to take advantage of this additional integrity mechanism, whistleblowers are required to trust an agency with which they may have had no previous dealings, let alone developed personal relationships with its staff. This is a step often taken in fairly desperate circumstances and with high expectations of the results. What has been shown in this chapter are some of the ways in which whistleblowers feel they are then let down by accountability agencies. This analysis has provided a greater depth of understanding of the poor levels of satisfaction reported by whistleblowers with the action taken by accountability agencies. Many of the concerns expressed about accountability agencies by whistleblowers are reflective of similar experiences they have had with departments. These same concerns are confirmed by the managers and case-handlers in those agencies who responded to WWTW surveys and gave in-depth interviews. This analysis has shown that from a range of perspectives external oversight agencies have failed to provide a layer of increased accountability.

Whistleblowers' difficulties with accountability agencies begin with the first response to the allegations they make. They discover that although the agency may confirm the likelihood of wrongdoing, it may not be considered serious enough to warrant attention or the existing priorities of accountability agencies do not encompass the type of reported wrongdoing. In some cases, whistleblowers feel that their allegations have simply not been adequately assessed and understood, and they feel powerless to influence the accountability agency's decision.

Alternatively their reports may be referred to another agency but not necessarily in ways that are supportive of them or their confidentiality. There are problems when confidentiality provisions are rigidly adhered to as well as when they are breached. At its worst, this system of referral between agencies becomes a completely circular process giving rise to a very real apprehension that no-one is interested enough to do anything about the wrongdoing.

The most common investigative response by accountability agencies is to refer the allegations back to the department in which the wrongdoing is said to have taken place, and where the whistleblower is generally still employed. This is not considered by many whistleblowers, or indeed managers and case-handlers, to be investigation by the accountability agency. It is certainly unlikely to result in a fresh and impartial decision being made. All three groups view accountability agencies as being too ready to rely on the reports provided by departments, sometimes written by the alleged perpetrator of the wrongdoing, and not sufficiently engaged to take direct action.

Even when accountability agencies do conduct investigations themselves, there can be problems with the quality and focus of the investigation, as well as the professionalism and skills of investigators. Managers and case-handlers are divided on the issue of whether accountability agency investigations are too heavy handed or too superficial with the fundamental wrongdoing being left unresolved – and all of it taking much too long. The appropriate level of intervention undoubtedly depends on the extent and seriousness of the wrongdoing disclosed.

What is evident from this analysis is a significant level of generalised dissatisfaction with accountability agencies that inevitably undermines the accountability relationship.

From no perspective is it clear that accountability agencies are ensuring whistleblowers' disclosures are properly dealt with in accordance with the second aim of whistleblower protection legislation.

The next chapter investigates these points further. It analyses the outcomes achieved by accountability agencies and the overall impact they have on the management of whistleblowing, particularly in terms of the protection of whistleblowers.

# Chapter 7 Outcomes from reporting wrongdoing to accountability agencies

> Whatever you do will be seen to be insignificant,
> but do it anyway.
>
> We must be the change we wish to see.
> (Mohandas Karamchand Gandhi)

## Introduction

Australian public sector whistleblowers are a test of the integrity systems in departments, and more broadly, of the whole system of public administration. This test arises not from the existence of wrongdoing, but from the treatment of those who bring it to light and the investigation and resolution of the wrongdoing. The core objective of whistleblower protection legislation in Australia is to provide a framework within which whistleblowers are acknowledged as a legitimate and important element of accountability, and the response to their disclosures is focused on improving the ethics and accountability of public administration.

This chapter analyses the extent to which accountability agencies have contributed to the successful implementation of the whistleblower protection framework. The focus of the chapter is on the achievement of two outcomes: (i) the protection of whistleblowers, and (ii) improved ethics and accountability in public sector departments.

The chapter proceeds as follows. Existing work on assessing the contribution of accountability agencies is reviewed briefly to provide context for the subsequent analysis. The importance of the role of whistleblowers to integrity systems is then confirmed by analysis of WWTW quantitative data. The extent to which accountability agencies protect whistleblowers is assessed in two ways. Support systems that might provide proactive protection are reviewed first. Reprisals against whistleblowers are then analysed, including the response by accountability agencies to allegations by whistleblowers that they are being treated poorly as a direct result of their making a disclosure. The final sections of the chapter focus on the achievements of accountability

agencies in relation to the specific integrity breaches disclosed by whistleblowers, and more generally, their promotion of departmental cultures that recognise whistleblowing as an important element of an integrity system.

## Assessing the contribution of accountability agencies to public administration

Auditors-general, ombudsmen and corruption/crime commissioners and other offices that form part of an integrity system are, by and large, assumed to be contributing to the integrity of government and public administration in those jurisdictions. There is no body of work that independently assesses their general contribution, let alone their performance in relation to whistleblowers.

The annual reports of these agencies focus on their achievements, with effectiveness and efficiency being assessed in a range of ways, including the use of powers, time taken to deal with matters, requests for review of decisions, numbers of reports making recommendations made and the rate of acceptance of these recommendations accepted (see for example NSW Ombudsman Annual Report 2003-04:19,52,67; Crime and Misconduct Commission Annual Report 2003-04:12,14,57; Ombudsman Western Australia Annual Report 2003-04:16-18). Some assessment is made by some agencies through customer surveys of satisfaction. These are not surveys independently conducted and analysed. The results are utilised to improve practice (see, for example, NSW Ombudsman Annual Report 2000-2001:12-13).

The roles of accountability agencies and their work have been analysed in terms of the strength of the integrity framework (see Brown *et al* and the NISA report). Colleen Lewis and Tim Prenzler (2008) analysed what performance indicators should be used to measure the effectiveness of independent civilian oversight of the police. They took a quantitative approach, relying primarily on matters processed, supplemented by case studies selected by oversight agencies. They concluded that statistics on demand and resource allocation were insufficient measures and that surveys and case auditing were necessary to provide a more complete picture:

> *Without such measures, there is no reliable evidence that the core business of independent civilian oversight agencies is being done as efficiently and effectively as possible.* (Lewis and Prenzler 2008:217)

Anita Stuhmcke (2008) conducted a longitudinal analysis of the Commonwealth Ombudsman, noting that her research was unique quantitative research on the operation of an ombudsman's office. She focused on the Commonwealth Ombudsman's increasing use of its systemic investigations function and the effect of this on improving government administration compared with the more traditional complaint-handling role of an ombudsman. Her assessment of the contribution to improved administration is primarily based on the number and type of recommendations made as a result of systemic investigations. Although Stuhmcke's analysis provides interesting commentary on the changing focus of the Ombudsman's work, it does not amount to a qualitative assessment of the extent to which that office contributes to improved administrative practices or the workplace culture in departments.

One reason for the lack of qualitative assessment of the work of accountability agencies is undoubtedly the difficulty in accessing cases and complainants. Strict confidentiality provisions apply to the work of these agencies. Data gathered through the WWTW research project include survey responses and interview material from whistleblowers who have approached these agencies. The particular contribution of this study is its qualitative assessment of the impact of accountability agency practices in one area of their jurisdictions, whistleblowing.

One of the limitations of this analysis is the absence of any really successful reprisal interventions by accountability agencies in the cases of whistleblowers interviewed for the WWTW project. Further, very limited information is available about the impact of accountability agencies on the substantive matter or wrongdoing reported by whistleblowers, not least because most investigations of the allegations were referred back to departments with no further intervention by accountability agencies. The most obvious difficulty is that it is not possible to compare empirically what has worked and what has not. A second limitation is that there is no direct measure for the impact of accountability agencies on organisational cultures.

Nonetheless, the analysis in this thesis throws some light onto the ways in which accountability agencies handle whistleblowing matters, and the views and judgements of other participants in these processes, namely departmental staff and whistleblowers

themselves. The views and experiences of accountability agency case-handlers provide a valuable additional perspective unique to research on accountability agencies.

Although accountability agencies deal with small numbers of disclosures by whistleblowers (see above), agency case-handlers, as well as departmental staff, value their contribution to improving integrity and accountability. The analysis below confirms that whistleblowing is not an activity that is peripheral to the roles and responsibilities of accountability agencies.

## The value of whistleblowing

Departmental managers and case-handlers as well as case-handlers from accountability agencies were surveyed on their views of whistleblowers and their place in the integrity system. They were asked, based on their experience, to rate a number of different mechanisms for bringing wrongdoing to light. Table 7.1 below compares the responses on the mechanism as very or extremely important. Departmental managers and case-handlers are dealt with as a single group. The table shows that both departmental staff and accountability agency case-handlers believe whistleblowers to be the most important mechanism, calculated as the percentage viewing the mechanism as very or extremely important. There are, however, some interesting differences in the views of other mechanisms.

**Table 7.1 The relative importance of mechanisms for bringing wrongdoing to light: accountability agency case-handlers (percentage)**

| Mechanisms | Agency case-handlers who viewed the mechanism as very or extremely important | Departmental managers and case-handlers who viewed the mechanism as very or extremely important |
|---|---|---|
| Reporting by employees (whistleblowing) | 94% | 91% |
| Routine internal controls (financial tracking, program monitoring) | 86% | 84% |
| Internal audit and review procedures | 84% | 76% |
| Client, public or contractor complaints | 83% | 71% |
| Management observation | 77% | 87% |
| External investigations | 72% | 48% |
| Accidental discovery | 38% | 38% |

**Source:** Integrity Agency Case-handler survey Q9; Manager and Case-handler Surveys Q14

Unsurprisingly, departmental managers and case-handlers viewed management observation as the next most significant mechanism. Accountability agency case-handlers rated internal audit and monitoring controls and procedures as the next most significant mechanism, with management observation rating only fifth out of the seven options. It is not clear why departmental staff have less confidence in the capacity of internal audit and monitoring to reveal wrongdoing. One possible explanation is that wrongdoing is viewed as a rare occurrence brought to light by personal observation by managers and/or whistleblowers, rather than through everyday controls. Much more explicable is the wide variance between accountability agency and departmental staff in the relative importance attributed to external investigations. It is indicative of the somewhat contested relationship between departments and external oversight agencies that departmental staff attribute low importance to this mechanism. This relationship is explored in more detail below as part of the analysis of the impact of accountability agencies on departmental culture.

Accountability agency case-handlers were also asked about the type of information provided by whistleblowers, in an attempt to tease out their views on the significance of the information and the motives of whistleblowers. Their levels of agreement with a number of statements are represented in Table 7.2 below.

**Table 7.2 Type of information provided to accountability agencies (percentages)**

| Statement | Strongly disagree | Disagree | Neither | Agree | Strongly agree |
|---|---|---|---|---|---|
| Most employee reports are wholly trivial | 10.5 | 69.7 | 17.1 | 2.6 | - |
| Most are wholly significant | 2.6 | 46.1 | 32.9 | 15.8 | 2.6 |
| Often contain inaccurate or mistaken information | - | 18.4 | 34.2 | 43.4 | 3.9 |
| Often contain intentionally false information | 18.4 | 47.4 | 27.6 | 5.3 | 1.3 |
| Often vexatious | 11.8 | 52.6 | 26.3 | 6.6 | 2.6 |
| Often entirely about personal or employment grievances | 1.3 | 32.9 | 32.9 | 30.3 | 2.6 |
| Often entirely about matters of public interest | 2.6 | 43.4 | 34.2 | 18.4 | 1.3 |
| Often about personal grievances and public interest | - | 7.9 | 36.8 | 52.6 | 2.6 |

**Source:** Integrity Agency Case-handler survey Q23

In aggregate, more than half of the case-handlers believed the reports to be a mix of trivial and significant information, in part concerning personal or employment grievances but mostly also including matters of public interest. Few case-handlers believed reports to be deliberately false or vexatious, but nearly half did believe that reports included inaccurate or mistaken information. These results generally confirm agency case-handlers' view that reports from whistleblowers provide significant information about integrity breaches, even when it is sometimes necessary to sift through the personnel or employment aspects of the disclosure in order to identify the issues of public interest. A departmental manager provided some insight into how public interest matters become entwined in personal issues:

> *Often employees will come forward with an issue of public interest which then becomes a grievance issue because the organisation doesn't know how to manage public interest disclosures particularly well. Because they're not clear how to manage a grievance versus a public interest disclosure they don't know what issue to focus on and therefore*

> *their response is inadequate to any of it which leaves staff confused and unhappy.* (Manager_3_Qld)

Given the overall view assessment that whistleblowing is important, it could be assumed efforts would be made by all parties to ensure that whistleblowers were supported and protected. The main elements of the legislative protection offered are the confidentiality of the whistleblower, protection against criminal or civil liability and protection against reprisals or other detrimental action such as disciplinary proceedings. Legal redress is also available if the whistleblower is subjected to reprisals or detrimental action. A number of accountability agencies were given specific additional jurisdiction to investigate allegations of reprisals against public employees reporting matters of public interest. Protection is not, however, limited to the legal prohibition against reprisals, but also assessment of risk of reprisal and management action to prevent this or other bad treatment of the whistleblower.

In this thesis, support is taken to mean proactive strategies that assist whistleblowers through the stressful and sometimes complex process of whistleblowing. In some cases, support would tend towards protective strategies as well, for example, as risk assessments and advice about how to deal with issues arising. The next section deals with the support available to, and used by, whistleblowers. Analysis of WWTW data indicates that support of whistleblowers is not dealt with particularly well.

## Supporting whistleblowers

Feeling isolated and out on a limb is not uncommon for whistleblowers. Alford quotes Ellsberg, the whistleblower who leaked the Pentagon Papers, as saying that '*his former friends and colleagues regarded him with neither admiration nor censure but with wonder, as though he were a space-walking astronaut who had cut his lifeline to the mother ship*'. Alford defines this space-walking as no longer belonging to the organisation, and being isolated from alternative sources of support or meaning (Alford 2001:5). Even if no Australian whistleblower described their experience as colourfully as Ellsberg, it is clear from the WWTW research that whistleblowing is difficult and almost inevitably stressful, and that many whistleblowers wish they had had better support through the process.

There are no particular provisions made for general support of whistleblowers in the jurisdictions under consideration, although as discussed in Chapter 3, a whistleblower support unit was suggested during the parliamentary debate in both New South Wales and Queensland. In neither State did the idea make it to the final form of the legislation.

Whistleblowers and departmental managers and case-handlers were surveyed about who did in fact provide important assistance and support. Brown and Olsen's analysis reveals that the sources of support are 'diffuse and informal' with other work colleagues at the same level as the whistleblower and families being the main sources of support. Formal internal support programs are not widely used. Brown and Olsen attribute this to whistleblowers not coming into contact with the programs or possibly not having considered the programs to be supportive (Brown and Olsen 2008:214-6). Another possibility, suggested by the analysis in Chapter 5, is that if a whistleblower has had to formalise his or her disclosure, he or she is already likely to lack trust in the department and is therefore unlikely to seek support from within that structure. As one whistleblower said of his department's whistleblower support program:

> *...it is still headed and overrun and overseen by guys at the top.* (Dennis)

Brown and Olsen state that the survey results confirm that '*even though a large number of agencies cite external agencies as an important source of support, in fact, this does not occur*'. They suggest the following reason for the result:

> *...few whistleblowers persist with a disclosure to an external agency unless they are already experiencing bad treatment or reprisals, by which time it is already too late for the external agency to positively assist.* (Brown and Olsen 2008:216-217)

The whistleblowers, managers and case-handlers who were interviewed were of the view that external accountability agencies provide minimal support at any stage. The closest any whistleblower who was interviewed came to suggesting an external accountability agency was supportive was Dennis, who described the ombudsman's office as doing an excellent job as a 'sounding board'. Accountability agency support was seen to be even lower after a whistleblower had experienced bad treatment or reprisals:

> *[External accountability agencies] don't provide any protection in my workplace around the allegations. So that would still fall to my organisation and they don't do that very well.* (Manager_2_Qld)

Other managers were simply unaware of any support offered to whistleblowers by external accountability agencies. The following is an extract from an interview with a case-handler.

> *Interviewer:* *So how effective do you think the support mechanisms in [the department] are for protecting and supporting people who report wrongdoing?*
> *Interviewee:* *I think it's really weak. Most of our support goes into the person subject to allegations, which I know it should be too, but most of it goes into the person subject to the allegation.*
> *Interviewer:* *And not much for the reporter?*
> *Interviewee:* *No.*
> *Interviewer:* *Is the situation any different for people who report to an external integrity agency?*
> *Interviewee:* *Again, I don't think they do.* (Case-handler_1_NSW)

Accountability agency case-handlers are extremely aware of whistleblowers' need for support, even if they do not provide it. Of the eighty respondents to the Integrity Agency Case-handler Survey, 39 per cent (n=31) cited organisational support as a factor in successful management of the welfare of a whistleblower by departments. One case-handler cited legislating for support of whistleblowers as the most important thing that could be changed to ensure increased reporting and more effective responses:

> *Legislation is silent on welfare support for those reporting wrongdoing – needs to be amended.* (Watchdog_1_NSW)

Only a commitment by the organisation to the protection of whistleblowers from reprisals, including maintaining their confidentiality, was mentioned more frequently, with 44 per cent (n=35) of case-handlers citing this as a significant factor.

As indicated by the accountability agency case-handler quoted above, support for whistleblowers, where it occurs, is an informal undertaking. On the other hand, legislation in each jurisdiction provides formal protection from reprisals or detrimental action resulting from the making of a disclosure (see below). Assessing the likelihood of reprisals against a whistleblower is an obvious step but there is no clear picture as to how well this risk is assessed by accountability agencies.

In three quarters of the cases they had dealt with, accountability agency case-handlers reported that whistleblowers had indicated that they feared reprisals when they first contacted the accountability agency. About 40 per cent believed that their agency conducted some kind of risk assessment of reprisals, with the majority of these stating that this assessment was done when whistleblowers first provided information. A further third said it occurred when the fear of reprisal was first expressed. Less than ten per cent reported that this was a formal process.

No data are available which indicate what might constitute a risk assessment by an accountability agency. It is possible that the informal assessment is simply a conversation with the whistleblower. It is also impossible to tell whether the details of the whistleblower's fears were recorded at that stage in the process so that, for example, disciplinary processes alleged to be reprisal action could be checked against the whistleblower's conduct record at the time of reporting. The whistleblowers who were interviewed did not give any indication of any risk assessment being conducted. As has already been shown, many believed that the accountability agency actions in fact sometimes exposed them to risks that they had not anticipated.

The following sections analyse reprisals against whistleblowers and the roles of accountability agencies in providing protection.

## Reprisals

The whistleblower protection legislation in each jurisdiction broadly defines the detrimental or reprisal action that is prohibited. All three Acts include action causing, comprising or involving (i) injury, damage or loss (personal and property), (ii) intimidation or harassment, (iii) discrimination, disadvantage or adverse treatment in relation to employment.

There are some differences. In Queensland and Western Australia the third category is defined more broadly and includes 'career, profession, employment, trade' as well as employment. In Queensland, the 'threat' of any such actions is also considered detrimental action. In New South Wales, disciplinary proceedings are specified as a form of detrimental action. In New South Wales alone there is a statutory time limit for bringing proceedings for an offence of detrimental action - within two years after the

offence is alleged to have been committed (NSW *Protected Disclosures Act 1994* s20; WA *Public Interest Disclosure Act 2003* s3; Queensland *Whistleblowers Protection Act 1994* Schedule 6 Definitions).

The Australian Standard on whistleblower protection includes an appended 'Suggested checklist of matters to be addressed in a whistleblower protection program'. Point 10 of this checklist refers to the need for:

> *A statement of the entity's commitment to protect and respect whistleblowers, including a commitment to protect the whistleblower's identity to the extent permitted by law, a prohibition on reprisals, discrimination, harassment or victimization against any suspected whistleblower, their colleagues or relatives.*

As already discussed in Chapter 2, some academics and commentators claim that whistleblowing is itself a predictor of reprisals (see, for example, Alford 2001, De Maria 1999). The WWTW research found this not to be true, with only about 20-25 per cent of whistleblowers experiencing reprisals (Smith and Brown 2008:124).

Using the WWTW data, the following analysis examines whether external reporting is a predictor of reprisals against those who reported experiencing them, the frequency and type of action taken and the success of accountability agencies in protecting whistleblowers. This analysis confirms that the reprisals experienced by Australian public sector whistleblowers are consistent with the findings of previous research, but suggests that reprisals are a precursor to reporting externally rather than a predictor of further mistreatment.

## Predictors of reprisals

Based on the WWTW Employee Survey, Brown and Olsen's analysis of predictors of whistleblower mistreatment identifies management as being the source of most mistreatment:

> *The odds of being treated badly by management [were] more than 4.5 times greater in cases in which the investigation of wrongdoing did not remain internal to the organisation but progressed externally'.* (Brown and Olsen 2008:149)

This finding is consistent with previous research that found one of the strongest indicators of retaliation against whistleblowers was that they reported outside the

organisation. Miethe, for example, found that external whistleblowers in America were more than ten per cent more likely to experience reprisals than those who reported internally:

> *Although external whistleblowers may gain some protection or immunity by going public with their allegations, the higher likelihood of organizational retaliation against them is the result of their violation of the sacred rule of keeping things 'in house'.* (Miethe 1999:80. See also Miceli & Near 1988 and Near & Miceli 1986)

The external reporting referred to in the research conducted in America (for example by Miethe, Miceli and Near) includes reports made to the media or publicly, but it also refers to reports made to regulatory agencies of one kind or another – not the same range of accountability agencies in Australia but nonetheless agencies or professional associations empowered to investigate wrongdoing. The rate of public whistleblowing to the media in the WWTW study was extremely small (less than one per cent of employees) so the external reporting referred to by Brown *et al* is to accountability agencies.

Brown and Olsen surmise that external reporting is an indicator of mistreatment:

> *It can be presumed that external reporting follows the onset of reprisals or other conflict between the whistleblower and management, with external involvement then perhaps contributing to this real or perceived mistreatment in many cases.* (Brown and Olsen 2008:150-151)

However, the WWTW survey instruments only asked reporters to indicate how well they were treated after reporting but does not distinguish between stages of reporting. It may be the case that Brown and Olsen's finding about increased reprisals following external reporting includes reprisals that were ongoing, and not the direct result of the external report. Certainly none of the whistleblowers interviewed as part of the WWTW study believed they experienced reprisals specifically for reporting externally.

## Frequency of reprisal

The organisational response to whistleblowers may be indicative of the ethical standards and levels of accountability. If standards are high, one might expect fewer reprisals and reports of mistreatment, and an appropriate response when reprisals are brought to the attention of management.

Smith and Brown report a national mean of 18 per cent of whistleblowers reporting reprisals. They also report a great variation in the levels of reprisal occurring within departments. In all jurisdictions there was at least one department about which more than 36 per cent of whistleblowers reported reprisals or detrimental action and two departments where the percentage of whistleblowers reporting being treated badly by management exceeded 40 per cent (Smith and Brown 2008:125).

The results of the Employee Survey indicate that the nine case study agencies were not among the most punitive. In four agencies, the percentage of whistleblowers who indicated they were treated badly as a result of reporting wrongdoing was above the national mean, at 34 per cent, 25 per cent, 25 per cent and 20 per cent. In two departments the rate was much lower, at nine and ten per cent, with the others falling in between.

Respondents to the Internal Witness Survey (also conducted in case study agencies) reported much higher rates of mistreatment as a result of reporting, between 40 and 92 per cent[7] with a mean of 73 per cent.

Twenty-eight of the 50 whistleblowers interviewed for the WWTW project reported suffering reprisals or other negative treatment. This 56 per cent of whistleblowers indicating they had experienced reprisals or other negative treatment is significantly higher than the 22 per cent referred to by Smith and Brown. The Employee Survey on which their analysis was based did not include whistleblowers still employed by the organisation, but Smith and Brown estimated that if those no longer working for the public sector were included in the survey, those experiencing reprisals or other negative treatment would still only comprise about 30 per cent of whistleblowers (Smith and Brown 2008:125-126).

The Internal Witness Survey did include some reporters identified and approached by external accountability agencies who no longer worked for the departments where they had blown the whistle. However, the numbers of ex-employees interviewed is too small

[7] One agency result was 100% but this was excluded as it referred to a single internal witness who also reported mistreatment.

solely to account for the difference. It is not clear why the percentage of those reporters interviewed who experienced poor treatment is so high, but it may be in some part related to sample self-selection. All these whistleblowers indicated their continuing interest in trying to pursue better outcomes or at least to make their difficult stories more visible. Alford's comment about one of the participants in his research may well be pertinent:

> *He seems convinced that if he can just find the right words to tell it, someone with the power to set things right will listen. It is a common delusion among whistleblowers.* (Alford 2001:27)

Departmental managers and case-handlers confirmed that reprisals were visited on whistleblowers by their departments. One commented on the effect of the department's defensive attitude towards disclosure of wrongdoing:

> *There is a tendency to be defensive, protective and secretive. The organisation is not open and is concerned that its image may be tarnished. The organisation is concerned about adverse media or political reaction. There is a tendency to protect those who allegations are made against and ostracise (through "shunning") the individuals who report wrongdoing. Those reporting wrongdoing are portrayed as difficult and malcontents.* (Manager_20_NSW)

It is clear that not all whistleblowers suffer reprisals or other bad treatment. What is also clear, however, is that those who make disclosures to external accountability agencies are highly likely to have had bad experiences within their departments prior to making the further report. It may well be the case that the personal/grievance components of disclosures (see above) are related these experiences. This analysis certainly indicates that accountability agency case-handlers should be very alert to the circumstances of whistleblowers and make careful judgements about when the practice of referring matters back to departments for investigation is in fact appropriate.

## Types of reprisals

The whistleblowers in the WWTW study rarely experienced a single act of retribution, for example, being fired. Consistent with the findings of many other studies, the mistreatment they experienced was constituted by a series of smaller, but nonetheless painful, acts of reprisal, commonly in the form of ostracism, bullying, humiliation, increased supervision or informal discrimination in employment.

Empirical research by Jos, Tomkins and Hays in 1987-88 in America found that about 60 per cent of those who participated had lost their jobs as a result of their blowing the whistle, being dismissed or forced to resign or retire. A further 32 per cent had their job responsibilities or salaries reduced, were transferred or reassigned against their wishes, were more closely supervised or experienced harassment (Jos *et al* 1989:554). Commenting on this research, Gobert and Punch observe that:

> *Whistleblowers often find themselves facing an all-out effort by their employers to discredit them.* (Gobert and Punch 2000:34)

Miethe found that about 90 per cent of reprisals against the 1500 American federal employees who participated in his study were informal. Only one per cent was fired, with a further five per cent being suspended or formally demoted. He also found that formal or official personnel actions, such as demotions or firings, decreased over time while more informal actions increased by about 46 per cent (Miethe 1999:75-6). In light of these findings, Alford's observation seems pertinent:

> *It is the organization's strategy of making the whistleblower the issue that leads me to draw on the work of Michel Foucault... more than any other theorist, Foucault is concerned with the way political disagreement is transformed into private acts that may be subject to discipline.* (Alford 2001:32)

The tendency to focus on the whistleblower rather than the disclosure was mentioned by departmental managers and case-handlers who participated in the WWTW research:

> *Management make assumptions that staff who have something to say are trouble makers instead of interested and concerned employees.* (Manager_8_WA)

> *I think also quite often the person who's reported the wrong doing is seen as the person who's caused the problem. Like if they've just been quiet about it and left it be, everything would have been alright... it's almost like we're putting them up for trial.* (Manager_18_NSW)

Smith and Brown's analysis of WWTW data makes it clear that reprisals and other negative treatment are usually of a kind that is not particularly visible to other people and are rarely conducive to investigation and resolution:

> *It is most often intimidation, harassment, heavy scrutiny of work, ostracism, unsafe or humiliating work and other workplace-based negative behaviour.* (Smith and Brown 2008:4)

Illustrating this point, Alford tells the story of Harris, an American whistleblower who was not dismissed immediately after reporting wrongdoing, but his shifts and work location were changed, he was not allowed access to the telephone or fax machine and then the photocopier. This led to poor work efficiency reports and he was fired two years later:

> *He was put through a series of trials designed to enrage and humiliate him or perhaps simply to ensure that he could not perform his job. When his inability to perform properly had been documented in several consecutive efficiency reports, he was fired. The record showed no connection between his blowing the whistle and his termination.* (Alford 2001:26-27)

Whistleblowers in the WWTW study confirmed the findings of previous research in that the reprisals they experienced were not confined to a single episode of poor treatment, but a series of smaller blows designed to humiliate and discredit (Rothschild and Miethe 1999:120, Miethe 1999:76-77). This treatment was experienced by survey and interview participants in the WWTW project. One survey respondent reported: '*I was located with disused furniture and given no work until I took leave*'.

Adam, a senior bureaucrat who eventually took a voluntary redundancy, talked at some length about being ostracised and excluded from work activities:

> *Some [colleagues] were certainly supportive in having a cup of coffee. Some of them were interested to know what was going – their relationship was as much an interest to know what was going on and some of them were genuinely taking a supportive role.*
>
> *A reasonable number of those - it would be a secluded coffee shop because they didn't want to be seen by this manager to be directly communicating or working with me.*
>
> *One feels isolated when the position you've worked in has usually been a fairly central hub of coordinating a lot of activity to having days when you may not have a phone call.* (Adam)

Ostracism, as a form of reprisal, was mentioned by a manager: '*for me isn't just a physical reprisal, it could be staff members just cease talking to that person'* (Manager_11_NSW).

The most general level of anxiety about potential bullying and harassment was expressed by Albert:

> *My greatest fear was that if I left the room for any reason, to go to the toilet for example, and I didn't log out of my computer that he would do something like – I mean he's just a dirty player. He would do something like logging me onto a kiddie-porn site or set me up in some way. That was my greatest fear – that I would be set up and they could ruin my career…* (Albert)

Lisa also talked about the abuse and bullying she was subjected to following making a disclosure:

> *I've been overworked, I've been abused, I've been bullied., I've been shouted at, the whole lot…In a new team my work is scrutinised but I can put up with that because that is scrutiny of my professional practice, right. They don't question the person… I can handle that. I can't handle not getting an answer about the bullying.* (Lisa)

Managers and case handlers reported knowing about staff who had left the organisation as a result of victimisation following their reporting of wrongdoing, and staff on stress leave:

> *I think if you look at our worker's compensation claims for stress leave over the last 5 to 10 years, you would see a significant number of stress claims that were directly related to victimisation.* (Manager_18_NSW)

Whistleblowers also experienced loss of promotional opportunities and professional standing, false or payback allegations, and disciplinary action (usually counselling). Colin talked about how from the point in time when he reported the wrongdoing:

> *…things just went wrong. Everything seemed to be going pear shaped for me. There was barriers coming up and it didn't look real good. I was being cut off from resources. I couldn't access anyone to assist – didn't feel good about the whole thing.* (Colin)

Evan, a senior officer in the department at the time he reported the misuse of funds, was instructed to take leave and his position, or one with the same duties but a different title, was advertised while he was away:

> *They're not supposed to be able to sack you without good cause but they work out these ways of getting around it by creating new positions to do the job that you were doing. They don't actually sack you but they can move you out of the position that you're in.*
>
> *Then they advertised the position. I applied for it, had the interviews, then they didn't appoint anybody… Subsequently when I was at a meeting and one of the people was on the interview panel by phone… said to me, somebody's out to get you at that [workplace], aren't they. He said he voted for me but he could tell that there were people that*

> *just didn't want to have me in that position. So as far as he was concerned I fulfilled all the requirements to be appointed to the position. Basically I wasn't appointed because of, I guess, their different sort of opinion.*

Evan kept a position in the department, albeit a different one, and the experience for him was of becoming aware of:

> *...people having to be yes people and people that criticise the organisation often eventually get marginalised and either leave the organisation because of the way they're treated or get marginalised and don't get promoted versus the people that say, yes, who do get promoted.* (Evan)

This view was shared by Scott whose career prospects ended with his reporting:

> *I found it's too big an organisation, you're only one little part of it so ... it's hard to buck the system, and if you do it's very career limiting and I've been told that, that I'm not getting promoted any higher.* (Scott)

In some instances, however, departmental managers and case-handlers agreed that departments were sometimes keen to remove the whistleblower from the ranks altogether. One manager spoke about a senior professional who had worked on contract for the department for a number of years. Following his reporting of wrongdoing, '*his contract was just not renewed. He was told on a Friday don't bother coming back to work on Monday.*' Departments sometimes seem to go to fairly extreme lengths to disadvantage a whistleblower. One manager described the department initiating a restructure in order to disadvantage a whistleblower:

> *People can be so subtle and ingenious in the way that they come up with ways to victimise people… It's usually in the form of preventing somebody getting opportunities for acting in senior positions, getting permanent placement into other positions. I can think of one instance where a person's position was regraded and the person was made displaced. Then the position was advertised at the higher grade and the person applied for the position, was unsuccessful, appealed to the [Government and Related Appeals Tribunal] GREAT committee.*
>
> *The GREAT ruled that the recruitment was inappropriate and that person should have been appointed to that position. So she was successful in her appeal in that process, was then put into that role and within a couple of days was told that the organisation had decided that they would be restructuring that unit and that she would probably be made displaced.* (Manager_18_NSW)

This manager was also clear that there was no way to prove that the decision to restructure that work unit was solely based on removing the whistleblower: '*How do we prove that? We can't*'.

The manager is right. Informal reprisals or mistreatment are extremely difficult to investigate, let alone prove. They occur without any document trail that can be investigated; no fingerprints are left. Richard described a combination of bullying, ostracism and the refusal of the department to investigate or resolve allegations made against him in reprisal for his report. Only his complaint about being forcibly transferred was in any way amenable to external investigation, and it was the only element of his complaint of reprisals that was taken up by an ombudsman's office. Before analysing the capacity of accountability agencies to protect whistleblowers, data from the Integrity Agency Case-handler Survey is provided to develop some understanding of those case-handlers' views of reprisals.

## An external viewpoint

There was general agreement among accountability agency case-handlers that whistleblower protection legislation makes reporting easier for employees (72% of respondents) and that the principles of the legislation were followed in their own agencies (82%). However, only slightly more than a third of respondents believed the legislation to be generally effective and an even smaller number (26%) showed any confidence in the power of the legislation to protect whistleblowers. More than half believed the legislation was in need of major change in order to improve employee reporting of wrongdoing.

The case-handlers were asked about their direct experience of cases involving alleged or apparent reprisals. Seventy-two per cent of respondents had experience of such cases, with about half having dealt with 1-10 cases, and 15 per cent had handled 20 or more cases.

Case-handlers were asked how often whistleblowers experienced problems as a result of reporting wrongdoing, a question designed to elicit some understanding of the negative effects of reporting beyond the experience of direct reprisals. Seventy-four per cent of respondents believed that the experience often or always resulted in social, physical,

emotional or financial problems for whistleblowers. These negative experiences were frequently attributed to the response of management and co-workers to the whistleblowers. About 60 per cent of case-handlers reported that in more than half of the whistleblowing cases they had dealt with, the whistleblowers had been treated badly by management, and a slightly higher percentage had experienced whistleblowers being treated badly by co-workers.

In terms of case-handlers' views about who best deals with allegations of reprisals, almost half indicated that none or almost none of the departments they had dealt with had successfully resolved reprisal claims. A further 38 per cent thought only about one-quarter of agencies dealt with reprisals at all well - a cumulative total of more than 80% of respondents. Case-handlers were not very confident of their own agencies capacity to deal well with reprisals either, with more than half indicating that they were only somewhat successful and less than a third believing they dealt well or extremely well with such situations.

Caution is necessary when reviewing the rates of substantiation of reprisals without being aware of all the details of the situation – if reprisals have not been taken against whistleblowers then they should of course not be substantiated. But, in the context of about three-quarters of accountability agency case-handlers believing that whistleblowers were treated badly by management or co-workers, it is salutary to find that more than 60 per cent report that allegations of reprisals are rarely or never substantiated, with a further third believing it only happened sometimes.

Accountability agency case-handlers as well as departmental managers and case-handlers were provided with a number of options when asked to identify the most common reasons for allegations of reprisals not being substantiated. Their responses are set out in Table 7.3 below. The views of the two groups (departmental staff responses having been aggregated) are remarkably consistent. One-third of each group believed that it was often or always the case that no reprisal had taken place. Despite this, when these respondents might have then not identified any further reasons for the lack of substantiation of reprisals, they continued to identify other options.

**Table 7.3 Reasons for lack of substantiation of reprisals**

| Frequency | Never | | Rarely | | Sometimes | | Often | | Always | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Departmental staff (Dept) Agency staff (Agcy)** | **Dept** | **Agcy** | **Dept** | **Agcy** | **Dept** | **Agcy** | **Dept** | **Agcy** | **Dept** | **Agcy** |
| There was no reprisal | - | - | 10 | 8 | 22 | 22 | 14 | 14 | 2 | 1 |
| Passage of time prevented proper investigation | - | 2 | 11 | 9 | 29 | 27 | 8 | 8 | 1 | 1 |
| The employee subject to the reprisal did not want it investigated | 3 | 3 | 21 | 19 | 19 | 19 | 1 | 1 | 1 | 1 |
| There was insufficient evidence | - | - | 1 | 1 | 16 | 16 | 30 | 28 | 2 | 2 |
| There was evidence of a reprisal, but not enough to identify or prosecute any individual(s) | 3 | 3 | 9 | 8 | 22 | 22 | 13 | 11 | 1 | 2 |
| There was evidence of a reprisal, but also that the same action could be reasonable or lawful | - | - | 7 | 7 | 24 | 23 | 16 | 15 | 1 | 1 |

**Source:** Integrity Agency Case-handler Survey Q37; Manager and Case-handler Surveys Q40)

Two other findings are of particular interest to this study. Insufficient evidence was consistently viewed as a common reason for the lack of substantiation. This finding supports the contention that the types of reprisals commonly experienced by whistleblowers, for example bullying and ostracism, are not amenable to investigation because of the lack of evidence. Of further interest is the view of about 50 per cent of both groups that whistleblowers do not want their complaints of reprisals investigated. One possible explanation is that reprisals were not in fact experienced by the whistleblower, the allegations being made more to emphasise their discontent with the department, and so they did not want investigation that might reveal this. One manager commented specifically on this point:

> *Whistleblowing is becoming more complex, people are using their status on some occasions to consider themselves to be a protected species and make allegations of reprisal when they do not exist. They*

> *use their status sometimes as a weapon against the organisation.* (Manager_5_Qld)

The other explanation is that whistleblowers considered that investigation would only make their situation worse. It is not possible to verify either of these propositions.

Accountability agency case-handlers were not particularly confident that departments are capable of dealing well with allegations of reprisals. They were also somewhat diffident about the success of their own agencies. Given this, it seems that neither the legislative provisions nor the procedures for protecting whistleblowers are providing structures within which the proposed protection becomes a reality. The following analysis of qualitative data tends to confirm this view.

## The handling of reprisals by accountability agencies

Whistleblowers were asked in the WWTW survey of internal witnesses what they did in response to bad treatment or reprisals. Only 27 of the 242 respondents had explicitly reported the bad treatment to government oversight agencies. Only three of these respondents said that this made things any better at all and 14 of them said it made things a lot worse. For the others nothing changed, which is not a positive outcome.

As already noted, there are significant limitations to the conclusions that can be drawn because of the very small number of whistleblowers who had taken this step. Only eight of the 50 whistleblowers who were interviewed had reported reprisals to accountability agencies: four had approached public sector standards agencies, two had reported reprisals to ombudsmen's offices and two to corruption commissions. The experiences of whistleblowers who were interviewed give some indication as to the reasons for their poor estimation of the success of accountability agency in protecting them. The three main reasons given were that the accountability agency took no action at all, the effectiveness of any action taken was extremely limited, or that the agency was biased in favour of the department.

Colin and Anna, who complained to corruption commissions about reprisals against them, were very unhappy with the way these complaints were dealt with. Both had included details of reprisals in the initial allegations of wrongdoing they had presented.

The reprisals Colin experienced included being cut off from resources, including email, being denied administrative support, refused permission to attend a conference and more generalised bullying and harassment, some of it broadcast by email to his colleagues. He had not heard anything substantive from the corruption commission, who had determined his original disclosure to be protected under the legislation. He had only confusing contact with the case-handler:

> *I reported it to the [corruption commission] and as I said nothing's happened. I've provided this detailed information and it's not going anywhere. I still haven't heard from [them] other than phone calls and in the last round of phone calls I got from them was after I had retired and it was out of nowhere, "Did you retire or did you resign?"*
>
> *And I didn't know, you know, I was driving a car, I couldn't work out what the hell… they wouldn't tell me what it was about, why they wanted to know what the difference was. And when I said well I resigned. "But didn't you retire?" "No, I resigned I had… I resigned so that I could retire." "So then you retired?" And it was like I was being badgered and I said, "Well, yes I did retire but I had to resign first." So it seemed to be something critical there.* (Colin)

The purpose or outcome of this conversation had not been made clear to Colin at the time of his being interviewed for the WWTW project, more than a year later. Colin was also confused because the corruption commission had advised that it considered his complaint a protected disclosure, but the ombudsman's office did not and would therefore not act on his claim of reprisals: '*And I've heard nothing more.*'

Anna's case has been discussed in some detail already. She was never told whether her disclosure of wrongdoing was considered a protected disclosure or not. Her final view was that not one of the three external agencies she had contacted were interested in dealing with either the original disclosure or the reprisals she had reported, and no investigative action was taken:

> *Well I put all of that to them, and they just didn't take it up. Then because events keep moving, and I think they lost track of all the enquiries as well… When they knew that I was at the Industrial Relations Commission that I had taken threatened unfair dismissal action, they then said well that's now the most appropriate forum. So they kept thinking that everyone else was doing their job, but in the end no-one did their job.* (Anna)

Four whistleblowers who were interviewed had appealed to public sector employment bodies about disciplinary action they believed was taken against them in reprisal for reporting wrongdoing.

Josie had contacted the public sector employment body because she believed a departmental investigation was biased against her from the beginning. She also believed that grievances made against her in reprisal for reporting would not be dealt with fairly:

> *[The public sector employment body] certainly recognised the breach in the standards as far as natural justice was concerned. The ombudsman really just referred me back to the [the public sector employment body] saying that I needed to go through there, that they did recognise that obviously there was something amiss there.* (Josie)

Josie initiated other proceedings through a lawyer and finally dealt with the matter in that way. During the WWTW interview, Josie provided no information about the results of her complaint to the public sector employment body, giving the impression that it was basically irrelevant to the resolution of the difficulties she had faced.

Following Bob's reporting, the department took action to demote him. He appealed to the public sector employment body, ensuring the body was fully aware of the context of the disciplinary action. The public sector employment body upheld the department's decision to drop his grading and therefore his income, but did not allow the demotion. Bob and his union representative did not understand the basis of the ruling; they had to wait outside during the deliberations and were then just delivered the ruling. There was no further appeal mechanism:

> *No-one really understands how that [body] works. Even the union rep with years of experience said they're so unpredictable, anything can happen… And he's right, it's a strange set up. Again I wouldn't go [the public sector employment body] unless I was absolutely certain I had a watertight case and I was going to win it without a doubt, even then I'd be a bit wary of them.* (Bob)

Warren was explicit about his feeling that the public sector employment body was on the department's side, not least because it did not take action to ensure the department complied with its rulings:

> *The [public sector employment body] found that [the department] had 'irretrievable flaws in the disciplinary process' in my case and ruled that my appeal be upheld. The Director General wrote to the [public*

> *sector employment body] requesting my appeal, which was allowed, be overturned but was denied and I feel because of this recommenced disciplinary action against me*
>
> *In one instance the [public sector employment body] had made a ruling that all those officers who were dealing with my case had to be replaced because I was not afforded natural justice however they continued to be involved with no action taken against them.* (Warren)

After a lengthy process and several changes of decision, the public sector employment body finally set aside Warren's appeal against disciplinary processes. He was so unhappy about the process and dealings between the department and the body that he made a further complaint about that agency to the corruption commission but was advised that the complaint did not constitute official misconduct.

Tracy was also granted a hearing before a public sector employment body:

> *...we had the hearing and then representatives from workplace investigations said ... their loophole is that we haven't closed our investigations. So [the body] then said you've got 14 days to do that. So they had to then do that and have an answer back to me within 14 days. And then I had to go through the whole thing again…it was me taking [the department] to [the body] that forced them to actually close the case, to have some sort of an outcome…. [the body] their hands are tied then, they can't do anything due to technical process.* (Tracy)

Tracy did not return to the public sector employment body because she was advised, off the record, by the departmental investigations unit that the manager who was responsible for the ongoing action against her would be removed from his position. He was dealt with a couple of months later by simply being moved sideways. Tracy's immediate situation was resolved, even though she felt the offender was insufficiently dealt with. There was no avenue for her to pursue this or to get any restitution for the issues she had dealt with for many months.

What is evident from the eight whistleblowers who complained to accountability agencies about reprisal action is that the reprisal action is consistently of a kind that is not amenable to investigation and resolution. Only occasionally are the processes of reprisal formal enough to involve transfer or demotion.

Dennis and Frank were reasonably positive about the responses they had received from ombudsmen's offices even though neither received full protection or restitution. Dennis had been formally counselled *'... for taking too many notes… it's one of the most ridiculous things that if you can't find something to degrade or affect somebody's credibility, it's even worse when you start making crap up'*. The counselling, which is a formal disciplinary action was overturned by the ombudsman. Dennis faced other charges that were also dropped but he was consistently refused promotions. At the time of interview, he was working in a different work location with less status but with staff he trusted. For him, one of the only positive outcomes of his reporting was confidence that *'... any corrupt bastard in the job isn't going to come anywhere near me'*.

The ombudsman's office that Frank complained to had one reprisal action overturned:

> *...but those reprisals are continuing. And when I said I was forcibly transferred against my will [the ombudsman's office] simply said did this happen? And the department said oh look you know we're sorry, we'll undo that. So they undid it and then when I was about to go back to my position another [manager] simply overturned the decision.*

The ombudsman's office intervened again and Frank was reinstated, but in the face of ongoing bullying and harassment he was on sick leave at the time of interview and contemplating medical retirement. He did, however, also talk about the possibility of continuing to complain to the ombudsman's office, although he had fairly low expectations of a substantive outcome:

> *If when I go back to the ombudsman's office if they're going to then do an investigation into the whole process in [the department] from the minister down including the deputy directors and directors and institute directors, a proper investigation, then I think well I'll stay until the end of that.*
>
> *But if when I go back and say what are you going to do about it and they say we're going to write letters I think that's not really good enough. They simply write letters and then they don't do anything about it. They said they're going to have a solution and they don't. And then six months, 12 months down the track then I get bullied again…* (Frank)

The outcome of Frank's situation is unknown but his apprehension that the ombudsman's office would have little success in dealing with bullying and harassment seems quite well founded.

## Limited support and protection

Protection of whistleblowers is provided by proactive support and risk assessment as well as investigation and resolution of reprisals. If departmental support structures do exist, and this is rarely the case, they are not often used by whistleblowers because their trust in departments is diminished as a result of making a formal disclosure of wrongdoing. Accountability agency case-handlers are very aware of the risks to and needs of whistleblowers, but their agencies rarely provide support and risk assessments appear to be quite informal. There is little evidence of action taken even when risks are identified.

This analysis does not confirm the proposition that reporting externally is a predictor of reprisals. Rather, the WWTW qualitative data indicates that reprisals are a precursor to reporting externally and no further reprisals are experienced. Nonetheless, the majority of whistleblowers who were interviewed had experienced reprisals, and some had reported them to accountability agencies. None of these whistleblowers believed accountability agencies had succeeded in resolving reprisals or protecting them. Ombudsmen's offices were seen in a slightly more positive light than other types of agencies. For the most part, whistleblowers reported that accountability agencies refused to take any action, or intervened in ways that were very limited. Some whistleblowers believed that accountability agencies were in fact biased towards the department. A significant proportion of those who had reported reprisals to an accountability agency believed that their situation had worsened as a result.

Whistleblowers' trust that accountability agencies would or could help resolve difficult or impossible work situations seems unfounded. The results of the survey of accountability agency case-handlers indicates that this not necessarily due to lack of general understanding or competence. Rather, the lack of action appears to stem from a failure of accountability agencies to develop and implement ways of dealing with whistleblowing that encompass the particular situations in which whistleblowers find themselves. 'Exit' procedures for whistleblowers are no more than those applied to members of the public who complain about public services – a letter advising of the outcome. Accountability agencies seem to rely on whistleblowers making further complaints about reprisals rather than taking any proactive action, but then do not

necessarily take up the further disclosure. Whistleblowers' disclosures, even about reprisals, are frequently referred back to the department with minimal or no oversight of the outcomes.

The qualitative analysis of data confirms that the types of reprisals most commonly experienced by whistleblowers are of a kind that is not amenable to investigation. It is rarely a single event, being fired for example, where documentary evidence would be available. Instead, whistleblowers are isolated from colleagues and resources, suffer loss of professional standing and are informally excluded from promotional opportunities. They are also bullied and harassed. The capacity of an external agency to investigate conduct of this order is extremely limited, but there is little evidence of a willingness to take up the challenge.

It must be concluded that accountability agencies are not successfully achieving the legislative aim of protecting whistleblowers. Neither is there evidence that they are able to rectify the specific wrongdoing that is constituted by reprisals against whistleblowers. A more successful strategy might be accountability agencies requiring departments to investigate and take appropriate action, and carefully assessing the results. Some departmental staff, as is discussed below, indicate that this approach would be beneficial.

## Improving ethics and accountability

The work done with whistleblowers and their reports of wrongdoing is obviously not the whole picture of the work done by accountability agencies to strengthen and support integrity systems in government departments. This thesis encompasses only the work done within whistleblower protection frameworks and no generalisation from this analysis to the broader scope of their work should be made.

We also know that not all internal reports of wrongdoing are brought to the attention of accountability agencies even when the internal response is insufficient (for example, Adam, who believed only intervention from the Auditor-General would have resulted in a proper investigation of his report). There is no opportunity to make a full comparison of whether internal or external reports are better dealt with. However, bearing in mind that very few whistleblowers approach an external agency in the first instance, Smith

and Brown's analysis of whistleblowing outcomes is salutary. Their analysis indicates that *'the most likely outcome of further investigation was the same result as before,'* with about nine per cent of whistleblowers believing the outcome to be worse (Smith and Brown 2008:116-117). In light of this, the achievements of accountability agencies in relation to whistleblowing are clearly limited.

The following analysis is restricted to the impact of accountability agencies on those reports that are made to them by whistleblowers who have, for the most part, already suffered negative impacts, either personal or organisational, as a result of their reporting. They are disappointed by outcomes and shocked by the organisation's response to the wrongdoing or, in fact, to them as whistleblowers. What this study is able to analyse is the extent to which accountability agencies have been able to step into the breaches left or created by departments.

As noted above, the analysis of outcomes achieved by accountability agencies following disclosures of alleged wrongdoing is limited by a lack of empirical data on effective interventions. Analysis of their approach to this work is possible and provides an opportunity to contemplate more effective strategies.

In Chapter 5, it was shown that personal ethical responsibility, a belief that the wrongdoing was serious and the anticipation that their action in reporting it would lead to that wrongdoing being rectified, were the most significant reasons for whistleblowers taking steps to report. In Chapter 6, reasons for the high levels of dissatisfaction with accountability agencies were analysed in terms of the assessment and investigation of disclosures. In this chapter, the outcomes of those disclosures are analysed to develop an understanding of the impact, actual and theorised, of accountability agencies on departmental cultures and practices. Analysis of quantitative data on whistleblowers' views of accountability agencies' processes, in particular timeliness and communication, is dealt with first. Quantitative data from the Employee Survey indicates that public sector departments often respond quite positively to disclosures of wrongdoing (Smith 2010:714, Smith and Brown 2008:113). The results of the Internal Witness Survey were, however, less positive in all the five different outcomes experienced by whistleblowers. The subsequent analysis of qualitative data, from

interviews and free text survey responses, provides a more detailed understanding of the outcomes of accountability agencies' work with whistleblowers. The quantitative data represent the views and experiences of whistleblowers both when they reported to an accountability agency in the first instance, and when they re-reported wrongdoing.

The Internal Witness Survey asked respondents to identify which person or body had most effectively dealt with their disclosure, if they had reported more than once. The data used below are the responses of whistleblowers who nominated an accountability agency as providing the most effective response to their disclosure.

## Outcomes of disclosures

The 'process' issues which give rise to whistleblowers' dissatisfaction with accountability agencies dissatisfaction are timeliness and communication in particular. Table 7.4 below shows that whistleblowers were very rarely satisfied with any of these processes when they made their initial disclosure to an accountability agency. The data on outcomes of re-reporting are the responses of whistleblowers who indicated that an accountability agency provided the most effective response to the re-report. These respondents are slightly more satisfied, but neither group indicated much confidence in the outcomes of any investigation.

**Table 7.4 Whistleblowers' satisfaction with process and outcomes**

| | | Not at all/Not very | Somewhat/very/ extremely |
|---|---|---|---|
| How well kept informed officially about progress of investigation? | Initial report to watchdog | 7 | 1 |
| | Later report | 4 | 4 |
| How satisfied were you generally with the progress of the investigation? | Initial report to watchdog | 6 | 2 |
| | Later report | 3 | 5 |
| How well were you informed officially about the outcome of investigation? | Initial report to watchdog | 3 | 5 |
| | Later report | 3 | 4 |
| How satisfied with the outcome of this investigation? | Initial report to watchdog | 7 | 1 |
| | Later report | 6 | 2 |

**Source:** Internal Witness Survey Q33, 34, 35, 36, 41, 42, 43 and 44

The results of the Employee Survey indicate that in 65 per cent of cases, whistleblowers' disclosures had been investigated. Following the investigation, 56 per cent of whistleblowers believed thing had improved in their department, 31 per cent reported no change and ten per cent thought things had got worse (Smith 2010:714, Smith and Brown 2008:113). Reprisals against whistleblowers were rarely reported and only 12 per cent of respondents believed there was a positive outcome from reporting them (Smith 2010:714-5). In this particular analysis, Smith and Brown do not distinguish between reporting to departments and reporting to accountability agencies.

Table 7.5 below sets out the findings of the Internal Witness Survey, which explore in more detail the outcomes perceived by whistleblowers who approached accountability agencies, both initially and at a later stage. As can be seen, only six whistleblowers who reported wrongdoing to an accountability agency at any stage in the process believed that wrongdoing was found and effectively responded to. The analysis that follows investigates the views and experiences of whistleblowers, managers and case-handlers on the role and work of accountability agencies.

**Table 7.5 Outcomes of disclosures to accountability agencies**

| Outcome of reporting to accountability agency | I'm not sure | No wrongdoing was found and no further action was taken | Wrongdoing was found but no effective action was taken to deal with it | Wrongdoing was found but no further action was taken to deal with it | Wrongdoing was found and effective action was taken to deal with it |
|---|---|---|---|---|---|
| Outcome of initial report | - | 2 | 4 | (Not asked) | 2 |
| Outcome of later report | 11 | 9 | 10 | 5 | 4 |

**Source:** Internal Witness Survey: Q32 and 40

### *Not being sure of the outcome*

Nearly 25 per cent of the respondents to these questions reported that they were not sure about the outcome of their disclosure. This result slightly contradicts those in Table 7.4 where whistleblowers were relatively satisfied with the official information about the outcome of an investigation. The difference is perhaps in knowing about the overall outcome, the impact of their reporting. Accountability agency case-handlers indicate

that whistleblowers are informed about the agency's findings by way of letter, the official information. On the other hand, whistleblowers are not necessarily entitled to be told about proceedings against the alleged wrongdoer(s). This can cause frustration, as Karen said:

> *I don't really know what they were doing in the department about it, apart from the little bit of information I was getting back at interviews, and this final letter… I'm disappointed in the outcome for my old boss. He may have been severely cautioned for all I know, but I don't know that.* (Karen)

### *Wrongdoing not found*

It is not surprising that wrongdoing is not always found. Whistleblowers are not always correct in their assessments of what constitutes wrongdoing, both in terms of the original allegations of wrongdoing and reprisal action. These things are sometimes a matter of interpretation:

> *Sometimes they see things that exist in issues and instances that aren't there, but in their mind it is. They complain.* (Manager_1_WA)

> *I think that the feeling that there has been a reprisal is an interpretation rather than a reality.* (Manager_6_Qld)

This manager went on to say that not achieving a particular outcome led whistleblowers to believe they were experiencing reprisals:

> *I don't think there are reprisals against people in general but I think sometimes people feel that there has been - because people will raise matters and feel that they want a particular outcome and if they don't see that particular outcome they may feel it reflects upon them.* (Manager_6_Qld)

Wrongdoing was more infrequently found as a result of a later report. It may well be that this result is influenced by further reports including more allegations of reprisal action (see discussion above) and the difficulties associated with the investigation of reprisals. As has already been discussed, evidence is not always available. As another manager stated:

> *Sometimes these things don't lend themselves to investigation or formal action because there's not witnesses involved. It's one person's word against another.* (Manager_7_Qld)

Sometimes, however, the finding of no wrongdoing may be the result of the accountability agency accepting the department's version of events rather than the whistleblower:

> *You will find 90 percent of the time they will go for [the department's] side of it because even though they're separate from [the department] they're just another state government body. They're supposed to be separate and supposed to be able to give a hearing impartially but I found that was not the case.* (Manager_1_Qld)

The difficulties in accountability agencies relying too heavily on the integrity of departments to investigate whistleblowers' disclosures was discussed in Chapter 6. The successful application of the principle of distributed integrity relies first on trusting departments to respond properly but reserving the possibility of more coercive and intrusive intervention should a department's responses be inadequate. The intervening step is of course that accountability agencies carefully scrutinise and assess the integrity of a department's response. From the analysis in this thesis, it is not clear that this level of careful attention is paid to departmental responses to whistleblowers. As one manager said:

> *[The department] is not happy with being reported externally. I think in lots of ways they tend to cover up and say it's all fine.* (Manager_26_NSW)

Another manager supported the need for careful oversight while describing the relationship between the department and accountability agencies:

> *It's one that appears to have congruent goals… but underneath it all there is a fair amount of suspicion. On the surface they look like they're working towards common goals but underneath it there's some potential question marks about how good the relationship actually is.* (Manager_8_Qld)

When accountability agencies do not conduct insufficient independent assessment of departmental responses, it is possible that wrongdoing is not identified.

### *Wrongdoing found but not effectively dealt with*

The second and third outcomes of wrongdoing found but either not effectively dealt with or no action taken are dealt with together in this section. The results indicate that whistleblowers rarely believe that, even when wrongdoing is identified by

accountability agencies, effective action is taken to remedy the integrity breach. This is particularly evident when whistleblowers re-report wrongdoing.

This result may be related to the high expectations of whistleblowers, and in particular to the lack of sufficient evidence to take action against the alleged perpetrator of the wrongdoing (see above). Barb's experience provides an example:

> *It was found, due to not enough evidence I think, it was found not to be as serious or whatever. And the organisation said okay, well [the accountability agency] has made the decision. You can now go kiss-and-make-up. We're all adults here and you can continue working together.* (Barb)

Another possibility is that as a result of accountability agencies choosing to deal with disclosures informally, and by referring them back to departments, the agency is unable to formalise any recommendations for rectifying action, or in fact may not know what the outcome was.

Departmental managers and case-handlers, as well as whistleblowers, found this outcome somewhat frustrating and a number wanted greater involvement by accountability agencies in order to be able to take advantage of their resources and powers. One manager spoke at some length about the advantages to the department of greater involvement from accountability agencies:

> *Generally what we have found is that they give them back to us to investigate, and then to report back. The problem we have with that is that we aren't resourced and don't have a lot of the powers to do what [corruption commission] can do, so often we feel a little frustrated that we know something is going on but we can't prove it.*
>
> *The problem we have then is that people are investigated I think, and they often feel they've got away with it. But we just don't have the powers to deal with it. And I can understand that [corruption commission], with what they've got on their plate, also haven't got the resources to deal with what they probably see as these more minor matters. But I think organisationally, for us, they're important matters.* (Manager_19_NSW)

The manager's view was that more involvement was the key: '*Where [corruption commission] comes onboard, we have a good relationship and we're more likely to get a good outcome*'. A number of other managers also commented on the lack of oversight

compromising the outcome. One referred to the need to ensure the accuracy of the department's report:

> *There is a need for outside agencies ... to be more proactive in monitoring matters that are raised, and not just the internal processes/ investigations of the organisation. Further there is a need for outside agencies to monitor that the final report pertaining to any wrongdoing allegation reflects the evidence collected in the investigation and is not just a creative document to meet the organisation's needs.* (Manager_20_NSW)

A number of whistleblowers agreed that accountability agencies relied too heavily on departmental views and were not providing a sufficiently independent outcome. One survey respondent stated:

> *The outside investigative organisations need to be reformed to make them truly independent.*

Warren's view was that no government agency should be responsible for dealing with whistleblowers' disclosures:

> *The [public sector employment agency], the Ombudsman, the [corruption commission] are all government bodies. I feel that complaints of wrongdoing within the public sector should be made to an external body outside of the government such as a law firm or similar for cases to be investigated properly.* (Warren)

This view was echoed by Eve:

> *I would like to see some type of independent integrity organisation that people can go to like myself in that situation whether it be from a hospital or the police or the education system and I'd like to see it be independent of the government because I have seen far too much interference, political interference, or situations that they've tried to manipulate because of politics. I think some things are too important for that.* (Eve)

Managers and case-handlers, on the other hand, indicated that matters were taken more seriously when an accountability agency was involved:

> *I know for a fact that I've seen a case where it was treated very seriously from an external point of view. Far more I feel than it would have been done if it had just been a departmental thing.* (Case-handler_5_WA)

Survey respondents also emphasised the value of increased involvement of accountability agencies when asked about the most important thing that could be

changed, outside their organisation, to ensure wrongdoing was reported more often and dealt with more effectively. The independence or neutrality of accountability agencies was seen as an advantage by two respondents:

> *Ensure that the organisation does not conduct the investigation. Should be external.*
>
> *If it would have been dealt with by an ombudsman … whatever you can get there wouldn't be that conflict of interest. There wouldn't be the hierarchy maybe protecting the other hierarchy.*

Once again, data confirms the need for increased oversight by accountability agencies. Another manager talked about the importance of accountability agencies being involved for long enough to ensure an effective response:

> *When the [accountability agency] investigate and makes reports, it's usually about something that's multi focused… Some of it can be acted on very quickly but other parts of it will take time and systems have to be changed and set up. I think we lose our way in that and the [accountability agency] aren't always – like they'll stick with it for six months or so but when it's a big change that will take 12 months or so to bring up, they don't often come back and check that it's all happening.* (Manager_26_NSW)

The interviewer asked whether this meant the accountability agency was not fully participating in the implementation of recommendations. The manager said, '*No, not at all'*.

Not all departmental managers and case-handlers indicated a desire for more involvement from accountability agencies. Their views are evidence of the sometimes contested relationship between departments and accountability agencies. Some respondents were quite strident in their criticism of accountability agencies for focusing on what they considered to be the proper responsibility of departments. Some of this criticism was directed at the heavy-handedness of the intervention by accountability agencies. Three different respondents made similar points:

> *Watchdogs need to allow agencies to manage issues more effectively.*
>
> *Less interference by oversight bodies.*
>
> *The oversight is often heavy handed and not focussed on the real or identified issues.*

A further respondent recognised the value of oversight, but not the approach taken:

> *Use external overseers as an integrity check on processes- being done to some degree now but the overseeing body [corruption commission] have their heads up their own backsides- e.g. too full of their own self importance and think they are above reproach- very dangerous.*

One of the results of this 'self importance' appears to be the impractical nature of some recommendations. One manager spoke about the department not implementing accountability agency recommendations because of resource implications:

> *Sometimes [management] don't accept the recommendations and they don't implement the recommendations. Again, it's that issue of whether they see a value in doing it, whether it's going to affect their operational output, whether they have the staff to be able to implement what they're asking to do, or the skilled staff to do it… You're asking us to do this but we don't have the resources, or the skills, or whatever to do it. I'd put oversight agencies into that same category of just another thing we've got to do and get off the books.* (Manager_19_NSW)

Another commented that accountability agencies did not always propose practical solutions:

> *I would also describe it as being sometimes what's written is not always practical. Especially to an organisation ... which is so large, to communicate the policies and the processes that an external agency may impose ... across New South Wales it can be sometimes quite difficult to achieve.* (Manager_11_NSW)

This manager made a further comment about the difficulties of achieving cultural change:

> *I just think that sometimes, the organisation itself, whilst we accept that the external agency has the intended good at heart, that it is then left up to the [department] from that opportunity there to try and get that message across or to try and change a particular policy or procedure or a culture. Because culture cannot be changed overnight, you know you need change management processes to change culture.* (Manager_11_NSW)

From the above analysis, it is clear that the reasons behind the outcomes achieved in response to disclosures by whistleblowers are quite various. Some are defensible, for example the absence of information about disciplinary or other procedures taken against wrongdoers. In other areas though, it is apparent that reliance on existing investigative methods and practices can inhibit the achievement of better outcomes. Once again, the

results seem to indicate that the successful implementation of whistleblower protection schemes would require a greater investment of attention and resources by accountability agencies.

## Using whistleblowing to impact on departmental culture

The whistleblower protection legislation in each jurisdiction has as its specific aims (i) encouraging the making of disclosures of wrongdoing; (ii) ensuring those disclosures are properly investigated and proven wrongdoing rectified; and (iii) protecting whistleblowers. The protection of whistleblowers is not, however, an end in itself. All the legislation is based on the fundamental proposition that the protection of whistleblowers is one mechanism for improving the standards of ethics and accountability within the public sector. This section focuses on establishing the extent to which accountability agencies have used the opportunities offered by disclosures from whistleblowers to promote improved workplace cultures in public sector departments.

There is, however, no direct measure for the impact of accountability agencies on departmental cultures. The difficulties of achieving positive change should not be underestimated. Accountability has been discussed as a relational concept, and the impact of accountability agencies on departmental cultures is to a large extent reliant on co-operative relationships with those they oversee. Often there is a co-operative relationship, as evidenced by the following comments from managers:

> *There's a lot of work that's being done to have open communication and to work towards a common goal. In the past it could have been adversarial but I think generally if you looking at it from a corporate perspective they've got good relationships.* (Survey respondent)

> *I think [the relationship] is good but I think we've worked fairly hard to make it good… we disagree on stuff… we try very hard not to be defensive. There's no purpose in not working well and professionally with those agencies. They've got a job to do.* (Manager_2_NSW)

Another manager was slightly more equivocal:

> *I think they find the oversight inconvenient and don't have a very high opinion of them… but that's not to say they haven't got a good professional relationship because they have.* (Manager_14_WA)

The sometimes contested nature of the relationship has also been noted above. It is clear that some managers and case-handlers are extremely resistant to accountability agency intervention. Of particular relevance is the following lengthy comment. The manager was insistent that departments could resolve their own integrity breaches:

> *The vast majority of issues are best dealt with internally. Orgs like [corruption commission] should stop wasting our available resources dealing with pedantic process related issues that don't impact outcomes so we use these resources effectively to prevent red issues arising. The actions of [corruption commission] are such that they are intrusive upon appropriate exercise of discretion in relation to issues they don't fully understand. They act more like 'Big Brother' trying to catch people out rather than focussing on areas of real problems, or assisting to support and improve.* (Manager_10_WA)

The manager's view was that accountability agencies should focus only on serious matters:

> *External orgs have a role in serious issues but not day to day workplace issues. External orgs need to identify and focus on seriousness, not turn government workplaces into the next best thing to a Police State.*

His view was that the practices of accountability agencies inhibited reporting and resolution of integrity breaches:

> *This is intimidating and threatening to employees and more likely to result in the non-reporting of issues fixed and resolved, not to get the other person into trouble. The [corruption commission] reporting obligations and their practices are a huge disincentive to issues being reported.* (Manager_10_WA)

Notwithstanding this comment, one way in which accountability agencies could have an identifiable impact on departmental cultures would be in ensuring that legal requirements and appropriate departmental procedures for dealing with whistleblowers are not only in existence, but are properly implemented. Noting the small number of whistleblowers who approach accountability agencies, a simple addition to the work done on every whistleblower's disclosure could be an assessment of the application of procedures. This procedure could in fact form part of a more formalised assessment of risk.

A whistleblower and a manager both commented on the need for accountability agencies to at least ensure their own guidelines were being implemented. The manager emphasised the department's role in this:

> *Accountability of management to external stakeholders to ensure guidelines are followed lawfully.* (Manager_2_Qld)

The whistleblower was more concerned at the lack of interest shown by the accountability agency:

> *So the big thing that I found that disturbs me a lot with this is that there are very comprehensive guidelines in place for agencies that were put in place by the [accountability agency] and they're not adhered to at all. And they're not really addressed by the [accountability agency] when it comes to that, where you put this in front of them and say, 'Well, they haven't even followed your guidelines', but they don't want to get involved with that. They've put them out there. It's not their role to regulate that. That's how they seem to see it, that's how it seems to come across.* (Colin)

A number of managers and case-handlers referred to difficulties with their own department's procedures. One element of this was the existence of good procedures only in compliance with requirements:

> *[We] probably have a policy but having a policy and actually having the traction to see it happening on the ground is two different things ... I think it needs to be done at a deeper level because if it's just ticking boxes and it's not genuine then it's not worth it.* (Manager_2_WA)

> *Are we putting these good systems in place because someone is watching us, or are we putting them in place because it's the right thing to do? I don't know.* (Manager_13_WA)

The need for cultural change to ensure good policies and procedures are embedded in departmental practice was another aspect of the difficulties voiced by managers and case-handlers:

> *There's two areas where we're exceptionally good and that's policy and structure, developing procedure... What we struggle with is the cultural change that's required to drive the sort of commitment that we're talking about ... the problem we have is the translation of them and the adopting of them in the actual workplace.* (Manager_13_WA)

As a case-handler stated:

> *I think the policies are good. What I have difficulty with is that they're not followed.* (Case-handler_1_Qld)

For others, neither the procedures nor the policies were sufficient:

> *I don't think they're implemented at all… we certainly have skeleton procedures… they're not handled well because … the people that handle them are a) not trained to do it and b) I think they look more at covering their own back and making sure that they're not going to get the flack from it.* (Manager_26_NSW)

Accountability agencies are clearly aware of the need for cultural change, and the role that procedures can play in encouraging improved standards of conduct and ethics. Evidence for this is taken from responses to the Integrity Agency Case-handlers Survey.

Case-handlers were asked to identify the three most important factors that made departments successful or unsuccessful in managing the welfare of whistleblowers. Their responses have been coded in order to identify the main categories and enable an assessment of what is seen as most important. Two factors were identified as the most significant. Departments developing and implementing good procedures for dealing with whistleblowers was seen as extremely important. Of as much significance is the need for a departmental culture that encourages values such as trust, honesty, integrity and transparency and where management is committed to resolving wrongdoing. The next two most important factors were adequate investigation of the disclosure and the provision of protection and support for whistleblowers. Other factors frequently mentioned were acknowledging the legitimate role of whistleblowers and protecting them against reprisals. Improved communication and confidentiality were also identified as important.

The kind of cultural change that is necessary, in some departments in particular, for whistleblowing to be at least acknowledged as a valuable contribution to accountability, can be at least influenced by accountability agencies ensuring compliance with procedures. This was the role envisaged for the Commissioner for Public Sector Standards in Western Australia and is reported on in the Commissioner's annual compliance reports. It is impossible to attribute a specific causal effect, but it is worth noting that Western Australia has the lowest number of whistleblowers making their disclosures to accountability agencies.

## Conclusions

The analysis in this chapter has focused on the extent to which accountability agencies have achieved the third aim of whistleblower protection legislation, the protection of whistleblowers. It argues that accountability agencies have failed to achieve this aim, partly because of resources constraints, but primarily because they have not instituted practices that take into account the particular needs of whistleblowers. It also argues that accountability agencies have failed to recognise whistleblowing as an opportunity to influence the development of improved ethics and accountability within departments. Integrity breaches are evident not only from the allegations that are the subject of the whistleblower's initial disclosure, but also the possibilities for intervening when whistleblowers experience reprisals and other bad treatment.

The importance of whistleblowing to the disclosure of wrongdoing was confirmed by analysis of WWTW quantitative data. The purpose of this analysis is to establish whistleblowing as core work for accountability agencies requiring adequate resourcing. Given that whistleblowing is valued by departmental staff and accountability agency case-handlers as the most significant source of information about wrongdoing, it could be assumed that the whistleblowers themselves would be supported and protected.

In this thesis, support of whistleblowers is taken to include proactive strategies for emotional support as well as risk assessments and advice on how to deal with issues that arise from the process of whistleblowing. Support systems for whistleblowers are not a legislative requirement and only a few departments have structured support systems. They are not often used and it is theorised that this is due to a lack of trust in the department. It is not proposed that accountability agency staff have any role in providing counselling but clear acknowledgement of the moral agency demonstrated by whistleblowers would seem to be a step in the right direction. Accountability agencies do not even appear to have procedures for consistent and recorded assessments of the risk of reprisals. For the most part, whistleblowers are treated in the same way as any complainant to the agency, despite their particular vulnerability. This vulnerability has been recognised by governments through the development of whistleblower protection legislation and one of the roles of accountability agencies is to ensure the protection of whistleblowers.

The way in which accountability agencies respond to reprisals against whistleblowers was analysed. Once again, accountability agencies fall short of achieving the aims of the legislation. Analysis of qualitative data indicates that reliance on their existing practices of referring matters back to departments for investigation without sufficient oversight results in compromised outcomes. This is particularly the case when resources are not allocated to ensure the proper assessment of department's reports back to the agency. Whistleblowers who approach accountability agencies have nearly always already dealt with departmental processes, and have frequently suffered reprisals as part of that process. It seems entirely inappropriate to refer them back to those departments without ensuring their safety, and the possibility of an independent review of the response to the original allegations.

Finally, this chapter suggests that accountability agencies have failed to recognise the opportunities provided by whistleblowing cases for improving departmental cultures. These opportunities are available both in relation to resolution of the wrongdoing initially reported, and perhaps even more importantly, when whistleblowers fear or experience reprisals. Accountability agency case-handlers have clear views about the factors which influence better handling of whistleblowing and they are consistent with the findings of this thesis. Pre-eminent is the need for departmental cultures based on shared ethical values and standards that recognise the contribution of whistleblowers to improved accountability. Of almost equal importance are departmental procedures which not only need to be of the highest standard, but need to be implemented fully. Ensuring this is identified as an opportunity for accountability agencies to influence improvements in departmental cultures.

Compliance with procedures is of course not the core purpose of accountability and should not be the sole aim of accountability agencies. Accountability agency case-handlers identify the need for departments to recognise the unique value of whistleblowers and the personal and ethical responsibility they demonstrate, moral agency. Accountability agencies would do well to take the advice of their own case-handlers and be the change they want to see.

# Chapter 8 Conclusions

> The ideals we cherish, our fondest dreams and fervent hopes may not be realised in our lifetime. But that is beside the point. The knowledge that in your day you did your duty and lived up to the expectations of your fellow men is in itself a rewarding experience and magnificent achievement. (Nelson Mandela)

## Introduction

The aim of this chapter is to bring together the analysis of empirical data in previous chapters and revisit the concepts set out in Chapter 2. Doing so strengthens the arguments and findings up to this point by firmly grounding them in a theoretical framework. One of the limitations of this study is that its analysis of the meanings of the patterns revealed by survey results relies on the relatively small number of whistleblowers who responded to the Internal Witness Survey, and the smaller number who agreed to be interviewed. The grounded theory approach to the analysis of qualitative data, whereby theory is generated from the data, is intended to overcome the problem of generalising from small samples (see Glaser and Strauss 1967, Charmaz 2006). It is the theory that is generalisable, not the case studies. The core theoretical categories or themes generated from this close analysis of the data were 'accountability', 'distributed integrity' and 'trust'. The conceptual framework of this thesis is developed from these theoretical categories and it provides the basis for a credible answer to the research question.

The chapter is structured in the following way. First, the main findings of each chapter are brought together to create a whole picture of the experience of whistleblowers in this study who report to external accountability agencies. The themes that have become evident are tied back into theoretical concepts of accountability and trust. Second, suggestions are made about future research that would provide additional depth of understanding to the roles of accountability agencies. Finally, five recommendations are made that, without the need for legislative amendments, would improve the way in

which accountability agencies implement the whistleblower protection legislation in their State.

## Findings and themes

This study has focused on the implementation of whistleblower protection legislation by accountability agencies in Queensland, New South Wales and Western Australia. The legislation in each of these jurisdictions was enacted by governments who were elected on platforms that included specific commitments to improved accountability and transparency of both government and the bureaucracy. In each case, the call for higher standards of public administration was a response to corruption scandals and transgressions of public trust. At this broadest level, accountability serves public trust. The findings of this thesis demonstrate that it is a reciprocal relationship and that trust is, in turn, an essential component of accountability.

Complex accountability frameworks and processes exist to ensure public trust in the integrity of public administration in Australia. While the ultimate moral authority or accountability belongs to the public, there are significant authorities and regulatory agencies delegated to exercise the function of calling public sector employees and departments to account. These include parliamentary committees, courts, tribunals and other enforcement agencies as well as the independent statutory agencies with specific jurisdiction to remedy integrity breaches and promote accountability and good governance. Of particular interest in this thesis are four 'families' of accountability agencies: auditors-general, ombudsmen, corruption and crime commissions and public service commissions. No new agencies were established to deal with disclosures by whistleblowers because governments considered that the existing accountability structures and institutions were sufficient to respond to whistleblowers' disclosures.

Government and Opposition members of each Parliament emphasised that whistleblowing was not to be considered an end in itself, but as a mechanism to strengthen the existing integrity system. The fundamental purpose of the whistleblower protection statutes in each State is to foster organisational cultures which recognise the valuable contribution of whistleblowers to accountability. The specific objectives of each statute are designed to achieve the underlying purpose. They are three-fold: (i) to

facilitate the making of disclosures, (ii) ensure their disclosures are properly dealt with and (iii) ensure the protection of whistleblowers.

The three legislative objectives reflect the core processes of accountability identified by Richard Mulgan (2003). These are initial reporting and investigating (obtaining information), justification and critical debate (analysis and discussion of the information provided) and the imposition of sanctions where information is insufficient or reveals wrongdoing (rectification). Four questions underpin these processes: who is accountable, to whom, for what and how? The core purpose of accountability is not, however, just compliance or control (Mulgan and Uhr 2000). A deeper purpose of accountability is the fostering of a sense of personal responsibility and obligation that is characteristic of a 'moral community' where community members share, and are certain of, the ethical standards and values that guide their conduct (Uhr 2000, Dubnick and Justice 2004). In this thesis, community members are the management and staff of public sector departments and agencies.

Accountability agencies and departments are part of each State government's integrity system. The 'institutionalisation of integrity' is necessarily the responsibility of all government departments and agencies. 'Distributed integrity systems' within departments are integral to their good governance (Brown and Head 2004). Accountability or 'core' integrity agencies rely on this distributed integrity for the investigation of the majority of integrity breaches and risks, and the promotion of ethical and accountable workplace cultures. There is much agreement that the most effective institutional arrangement for ensuring the integrity of public administration is initial reliance on informal cooperation between departments and accountability agencies. In essence, departments are trusted to resolve their own integrity issues. Only when this trust is breached do accountability agencies formalise their intervention. Accountability agencies are vested with significant coercive investigative and reporting powers which they can employ to strengthen internal integrity systems and to bring about wider cultural change in the event of systemic breaches of ethical conduct and trust (Braithwaite 1998, NISA Final Report 2005, Smith 2008).

Viewed within the context of an accountability framework, the roles of whistleblowers, accountability agencies and public sector departments become clearer. The parliamentary debates and the legislation establish whistleblowers as a mechanism for the first process of accountability, those who bring wrongdoing to light. Employees are often the first to know when problems occur within an organisation and are uniquely placed to report their concerns so that wrongdoing can be stopped. Their value in bringing wrongdoing to light is confirmed by departmental staff and accountability agency case-handlers alike. They are also the people with much to lose if institutions and cultures do not support the disclosure of wrongdoing.

Whistleblower legislation prescribes the authorities to whom whistleblowers can make disclosures and be protected. These authorities have legislated responsibilities for receiving and assessing disclosures and ensuring a proper response. They are mechanisms for the second process of accountability. Public sector departments as well as accountability agencies have roles as recipients of information, with responsibility for investigating whistleblowers' disclosures to ensure all relevant information is available. Both departments and accountability agencies can determine whether the conduct disclosed by a whistleblower was in fact wrongdoing. Whistleblowers are able to choose to whom they report. It is, therefore, essential that they have ready access to accurate and useful advice about how to make their disclosures and who might be the most appropriate recipient.

Analysis of departmental guidelines indicates that comprehensive guidelines are modestly correlated with the proportion of employees who report serious wrongdoing (Roberts 2008). Information in departmental guidelines about to whom disclosures could be made, and the roles of accountability agencies in relation to whistleblowing, was found to be reasonably comprehensive. On the other hand, analysis of accountability agency annual reports and websites found the publicly available information to be of very variable quality, but established no correlation between this information and reporting to the agency. This finding slightly undermined the theoretical position that trust of an organisation depends on an understanding of its role, reliability and reputation. Close analysis of empirical data revealed that breach of trust by departments was the significant factor in whistleblowers choosing to report

externally. This decision was not so much based in explicit trust in an accountability agency, but rather as a last resort.

Employees who witness wrongdoing demonstrate an overwhelming inclination to report to someone within their own departments when making an initial disclosure, trusting that there are shared commitments to ethical and accountable conduct. WWTW data also indicate that employees generally choose to report wrongdoing for highly ethical reasons: personal ethical responsibility, a belief that the wrongdoing was serious enough to warrant a significant response and that the whistleblower's action would assist in correcting that wrongdoing. These whistleblowers demonstrate the sense of personal responsibility and moral agency that is the fundamental purpose of accountability.

Whistleblowers' trust is breached when the response to the disclosure is inadequate, they experience reprisals, or both. This argument is based in part on the quantitative findings of the WWTW research, that one of the few differences in the 'organisational citizenship behaviour' of whistleblowers and non-reporters is that those who do report are marginally less trusting of the management team. There is lower trust again among those who report externally. It is difficult to determine from the statistics alone whether the trust issue arose after they had problems with reporting or was a precursor to those problems. However, during interviews many whistleblowers talked in one way or another about their need to report to someone whom they could trust. Although it has been shown that whistleblowers were frequently aware of the risks in reporting, the majority do still choose to report internally, indicating a sufficient degree of trust in management.

There is some evidence to indicate that many whistleblowers believed they could resolve the wrongdoing quite informally with their managers. The step, from being able to 'sort things out' to having to formalise their disclosure within the department, appears to be a bigger concern, for some at least, than the decision to report externally. The initial loss of trust was associated with a clear understanding that they had were at risk and were being viewed not as loyal employees, but dissident from the workplace culture.

Only a small number continued to press their case with an external agency when they were disappointed in the response by their own management. Additional barriers to reporting externally are created by accountability agencies themselves through the limited or highly technical information they make available to potential reporters. Not all the whistleblowers in this study were aware of their right to report externally, let alone how to contact accountability agencies or in fact how to present their reports of wrongdoing. A further issue was not knowing what issues might be taken up by an accountability agency.

While legislation privileges neither internal nor external reporting paths, whistleblowers' preference for internal reporting is consistent with the view that departments should, in the first instance, be responsible for ensuring their own integrity and accountability. Notwithstanding this, the very slight use of external accountability agencies, particularly at an early or initial stage of reporting, tends to indicate the limited effectiveness of those agencies in promoting their roles under whistleblower legislation. In light of this, together with the finding that such agencies in fact create barriers for whistleblowers, it cannot be said that accountability agencies achieve the first aim of whistleblower protection legislation - facilitating the making of disclosures.

When whistleblowers do report externally, they have high expectations that the accountability agency will conduct an independent review or investigation and ensure rectification of the wrongdoing. The analysis in this thesis indicates that, to a significant degree, the low levels of satisfaction with the outcomes of reporting to accountability agencies are associated with either wrongdoing not being found or, when it is, that no effective action is taken to deal with it.

It is not surprising that accountability agencies do not always confirm reports of wrongdoing. Whistleblowers are not always correct in their assessments. What is of more concern is that even when wrongdoing is found, it is not remedied. This is no doubt in part related to whistleblowers' expectations about what constitutes an appropriate response. In many instances, however, it appears that accountability agencies' reliance on departmental investigations and determinations is a major source of dissatisfaction.

Whistleblowers were surprised, and in some cases horrified, to find that accountability agencies did not conduct independent investigations of their disclosures, even when the likelihood of wrongdoing was confirmed. One whistleblower in the study described this as putting '*Dracula in charge of the blood bank*'.

There was a very real apprehension among whistleblowers that agencies were more interested in finding ways to refuse disclosures than in investigating them. The importance of supporting the 'distributed integrity' in departments has already been discussed, but it is not the only reason for the referral of matters back to departments. Resource constraints require accountability agencies to develop strategies to deal with increasing numbers of complaints and referrals. One strategy is to ensure resource intensive investigative action is restricted to more serious matters. Whatever the rationale, whistleblowers indicated their belief that their trust was further breached through the common practice of their disclosures being referred back to departments for inquiry and resolution.

In none of the cases in this study was there evidence that accountability agencies took into account that whistleblowers had nearly always already been through departmental processes and had been disappointed in the results, or punished for their efforts. Rarely was an outcome that was different or better achieved through reporting to an accountability agency. In order to develop a more detailed understanding of this result, the views of departmental managers and case-handlers were analysed. They tend to confirm whistleblowers' fears that accountability agencies rely too heavily on departmental responses, which were sometimes written by the alleged perpetrator of the wrongdoing but certainly usually confirmed the pre-existing view of the department. Departmental staff did not consider that accountability agencies conducted sufficiently thorough or independent assessments of the responses, in accordance with their oversight role. Whistleblowers lost trust that accountability agencies were providing an impartial review and many departmental staff agreed with them.

Departments have the power to directly rectify integrity breaches and impose sanctions on perpetrators of wrongdoing. Accountability agencies, on the other hand, do not. Rather, if they have conducted the investigation, or have required a report back from a

department, they can make recommendations or suggestions aimed at the resolution of the immediate problem and strengthening of integrity structures to minimise the possibility of recurring wrongdoing. In the absence of thorough review of action taken by departments, any opportunity to promote improved systems and cultures within departments is lost. In addition, it is apparent that accountability agencies did not stay involved long enough to ensure that integrity breaches were resolved or cultural change achieved.

In failing to ensure that departments respond in a trustworthy way to whistleblowers' disclosures, accountability agencies themselves fall short of the role they have been entrusted with, that is, using their independence as well as their significant investigative and reporting powers to ensure the public trust. In so doing, they are also failing to achieve the second aim of whistleblower protection legislation - ensuring that disclosures are properly dealt with.

The third legislative objective is the protection of whistleblowers. Legal protections for whistleblowers, apart from ensuring the confidentiality of the individual, operate retrospectively. Taking reprisal action against a whistleblower is a criminal offence. In this thesis, it is proposed that accountability agencies could provide proactive protection of whistleblowers by assessing the risk of reprisals and improved support through the whistleblowing experience. Accountability agency case-handlers were clear in their beliefs that both these strategies are important in the management of whistleblowing cases. Despite this, only ten per cent of these case-handlers indicated that their agencies conducted formal risk assessments, and no data was available to indicate what might in fact constitute an accountability agency risk assessment. None of the whistleblowers who were interviewed gave any indication of a risk assessment being conducted and many in fact believed that the actions of accountability agencies had exposed them to increased risk.

This study found that experiencing reprisals was a precursor to reporting externally rather than a result. WWTW survey data as well as the qualitative data from interviews confirm the findings of American studies that reprisals are not generally experienced as a single devastating blow, being fired for instance. Much more commonly, reprisals are

a series of actions designed to isolate, humiliate or harass whistleblowers without leaving a trail of evidence. These types of actions are clear breaches of the whistleblowers' trust in the workplace culture or 'moral community' in their department. They are, however, extremely difficult for accountability agencies to investigate. What the whistleblowers in this study experienced, even more than the difficulty of having reprisals against them proven and stopped, was a disinclination by accountability agencies to take any action at all. A significant proportion of those who had reported reprisals to an accountability agency believed their situation had got worse as a result. Allegations of reprisals were also referred back to departments for investigation and resolution. Once again, in principle at least, this strategy has merit. Departmental managers are often in a better position than external investigators to deal with bullying and harassment of whistleblowers. However, whistleblowers who approach accountability agencies have nearly always dealt with departmental personnel and processes already and, where reprisals have been experienced, it has been as a result of these processes and at the hands of departmental personnel. The careful oversight which would seem an essential component of trusting departments to resolve these integrity breaches was not evident in the cases in this study.

Even taking into account the difficulty with investigating informal reprisal action, there is little evidence that accountability agencies have developed and implemented ways of dealing with whistleblowing cases, either proactively or in response to allegations of reprisals, that take into account the particular situations and vulnerabilities of whistleblowers. The only conclusion is that accountability agencies are failing to implement the third objective of the whistleblower legislation – the protection of whistleblowers – and that in this failure they once again breach the trust of whistleblowers.

In light of the above, the research question posed in this thesis has to be answered in the negative. External accountability agencies are not achieving the aims and objectives of the whistleblower protection legislation in their jurisdiction. In the final analysis, it also appears that accountability agencies fail to recognise the opportunities provided by whistleblowing cases for promoting organisational cultures that recognise the

contribution of whistleblowers to accountability. In this way, they also fail to achieve the fundamental purpose of whistleblowing legislation.

The whistleblowers in this study who disclosed wrongdoing in the public interest were not only operating as a mechanism of accountability, but also demonstrating its deep purpose, a sense of personal responsibility for ensuring high standards of ethical and moral behaviour. When their 'moral agency' is not recognised and supported by accountability agencies, it is the public trust as well as that of individual whistleblowers that is breached.

## Further research

One of the limitations of this study is that the views of accountability agencies are less well represented than other participants in cases of whistleblowing. Analysis of their roles is based primarily on the views of whistleblowers and departmental staff, supplemented or balanced where possible by the results of the Integrity Agency Case-handler Survey. As noted in Chapter 2, a more detailed picture may have emerged if data from the Integrity Agency Survey had been usable. It is likely that this restricted perspective has resulted in harsher judgements about the performance of accountability agencies than might have otherwise been the case.

Further research that contributes to a more complete understanding of the approaches developed by accountability agencies to the implementation of whistleblower protection legislation would be valuable. One option is to analyse the submissions made by accountability agencies to reviews of the legislation. In New South Wales, for example, the *Protected Disclosures Act 1994* was reviewed by a parliamentary committee in 1996, 2000, 2006 and 2009. The NSW accountability agencies all made submissions to these reviews that included recommendations for legislative amendment, based on their experience. The legislation was finally amended quite extensively in 2010 and an evaluation of the extent to which the amendments reflect the recommendations of accountability agencies would provide further insight into the impact of those agencies on the accountability framework offered by whistleblower protection legislation.

A further piece of research is suggested by the recent amendment of the NSW legislation. The NSW Ombudsman has been given additional responsibility for

monitoring and auditing the implementation of whistleblower protection legislation to ensure that it is achieving its purpose. More extensive public reporting on compliance with the new Act is also required. This increased role is similar to the role of the Victorian Ombudsman under the *Whistleblowers Protection Act 200*1. A comparison of the, albeit self-reported, achievements of the two ombudsmen's offices, sometime in the not too distant future, would provide a further opportunity to evaluate the work of accountability agencies with whistleblowing cases.

## Recommendations

Although the recommended research might result in a more balanced view of accountability agencies' achievements, I stand by my findings in this thesis. In its writing, some strategies have become apparent that would remedy the breaches of trust and accountability which have been identified, without the need for legislative amendment.

In the first instance, more frequent, more formal and recorded assessments of the risk to whistleblowers at the time of disclosure would demonstrate accountability agencies' understanding of the vulnerabilities of these employees and provide more complete information against which any allegations of reprisal action can be assessed.

Accountability agency case-handlers believed that the majority of disclosures included a mix of public interest and personnel grievance information. More thorough assessment of whether the personal matters are in fact reprisals resulting from internal disclosures would provide an additional platform for the protection of whistleblowers rather than a reason for declining to take action on the disclosure.

A further avenue for ensuring the safety of whistleblowers and the proper implementation of the legislation would be to require departments to demonstrate the proper implementation and effectiveness of their internal reporting procedures in each case. Given that the numbers of whistleblowers reporting externally are very low, this would not be hugely resource intensive but would provide a very direct avenue through which accountability agencies can ensure at least compliance with legislative and departmental requirements, and potentially influence a change in departmental cultures.

In addition, accountability agencies should reconsider the current view that bullying is solely a personnel issue. The WWTW data reveals extensive evidence of entrenched bullying practices and there is a point at which this is no longer an entirely reprehensible action against an individual, but a cultural issue that affects the integrity and safety of all employees in a work unit.

Finally, if accountability agencies continue to rely on the distributed integrity in departments to investigate both the initial disclosure by a whistleblower and any allegations of reprisals, and it may be appropriate to do so in some cases, it is essential that they conduct more thorough assessments of departmental actions. In addition, if they make suggestions or recommendations to remedy integrity breaches revealed through whistleblowing they need to ensure that the departmental response is not just compliant but does in fact lead to real cultural change.

This thesis does not claim that all whistleblowers are diligent, ethical employees reporting wrongdoing in the public interest. That is beside the point. The aim of whistleblower protection legislation and the responsibility of accountability agencies is to ensure that all public sector departments and agencies develop organisational cultures and practices that are committed to integrity and transparency, protecting those who do speak out and ensuring a proper response to disclosures. Achieving these aims is essential to ensuring accountability and the public trust.

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**INTERNAL WITNESS INTERVIEW**

Key issues to explore:

1. The complaint/ investigation process – both internal and external. With both internal and external complaint processes, explore:
   i. Why report/ become involved with the investigation – including why they chose to report in the way they did (person/position – internal/external)?
   ii. How satisfied are they with:
      a. the investigation outcome
      b. perceived competence of the investigator/s
      c. outcome
      d. management's handling of complaint?
   iii. Type of advice/ support given by internal and/ or external agency (before, during and after investigation) or was support provided by another external source
   iv. How kept informed of investigation process and /or outcome.

2. What was the person's expectations before complaint/ investigation process and were they met (explore what they thought might happen)?

3. Any reprisal (harassment, job transfer, loss of promotion etc.) and /or negative consequences (eg illness, depression, relationship breakdown, financial hardship etc.) suffered by interviewee?
   i. What were they?
   ii. Did they complain or take such matters further?...what happened?....were they satisfied with response
   iii. Any support given to help deal with reprisal/negative consequences?

4. Closure - Is their whistle blowing experience,
   i. Completely behind them,
   ii. Almost completely behind them,
   iii. Partly behind them (still a few issues), or
   iv. Still very much with them?
   v. Why? Has it anything to do with treatment by:
      a. Management/co-workers/investigators;
      b. Support provided by case officers/welfare officers?
      c. Or something else?

5. Have their perceptions changed in relation to:
   i. The organisation?
   ii. Their career?

6. Looking back at the way the organisation handled the whole issue, what parts (if any) were done well?

7. What sort of impact did their reporting and/or the investigation have on the organisation?

8. Would they report again……why?

**MANAGER AND CASE-HANDLER INTERVIEW**

About the interviewee:

Could you please briefly outline your current position in the organisation, in particular, do you have any formal role in respect of persons who come forward with reports of wrongdoing? If so, is that role:

- as line-manager of an employee who made the report;
- deciding whether the report concerns wrongdoing:
- conducting the investigation; (Explain to the interviewee, that we regard an 'investigation' as the process of gathering information, interviewing relevant people and preparing a report on the findings for action)
- supporting and protecting of employees who have made a report?

Note that interviewees may nominate more than one role in which case ask the additional questions related to the role nominated (Mgr = manager; Inv = investigator; Sup = support/case-handler).
If interviewee nominates alternative: /case-handler

## 1. INTERVIEWEES' VIEW OF THE ORGANISATION'S PROCEDURES

**As this project has progressed, we have become aware that good written procedures do not necessarily guarantee that reports of wrongdoing are handled well.**

1. How would you describe the adequacy of your organisation's procedures for promoting, and protecting persons who come forward with reports of wrongdoing and how well they are implemented?
2. Are there parts of the procedures that you, yourself, have difficulty with, do not understand or think should be changed?
3. Do you describe your organisation's approach to the encouragement and protection of employees that report wrongdoing as 'proactive' or 'reactive'?

**We know about organisations' formal systems for recording reports of wrongdoing, their investigation and dealing with those who make the report. We are also aware that in many organisations, reports of wrongdoing are received by line managers, outside this formal system, who may resolve the issues raised by employees at the line manager level.**

4. Does your organisation deal with reports outside of its formal system?
5. What proportion of reports do you think may be dealt with informally?
6. What do you think are the advantages or disadvantages of not using the formal system?
7. How do you determine what is office gossip and what is a matter requiring action?
8. If it does require action, how do you decide whether to deal with reports formally or informally?

**Preliminary findings from our research indicate that there can be some overlap between HR matters, grievances from disgruntled employees or reports of wrongdoing that have a public interest dimension.**

9. How common is it for a complaint to involve both a personal grievance and a matter of public interest?
10. What tends to be more common – for a personal grievance to be present prior to a report of wrongdoing being made or vice versa?
11. What do you do when there is a combination of these aspects?
12. Do you separate out these things and deal with them by different processes?
13. If so, what processes and what criteria do you use to separate? If not, what is the default process?'[NB here you can go in knowing how the respondent answered Q26 & 27 of the manager/case handler survey]
14. (*Mgr*) Do you believe that staff who are considering reporting wrongdoing clearly understand the best strategy for reporting to the most appropriate point in the organisation?
    i. Why?
15. (*Mgr*) Do you consider that staff in your organisation know when it is appropriate to report wrongdoing internally and when it is appropriate to report externally?

16. Do staff in your organisation know when it is appropriate to report wrongdoing directly up the line (to their manager, or manager's manager), or by reporting to a specialist unit, central hotline etc
17. (*Mgr*) Have you had experience of cases where an integrity agency (e.g. Ombudsman, ICAC, CMC) has become involved?
    i. Which integrity agencies?
    ii. How did it get referred? (When the investigation was taken to a second or further stage, did the whistleblower make the second report of his/her own volition or did the organisation act to progress the investigation as part of the outcome of initial inquiries?)
18. In your opinion, why have whistleblowers chosen to report to an integrity agency rather than internally?
19. In your opinion, is there any difference in the outcome when a whistleblower reports to an external agency? (Does an integrity agency investigate better having the advantage of distance/independence? How does the organisation view external reporting and the whistleblower?)
20. How would you describe the relationship between your organisation and the integrity agency(s)?

## 2. THE INVESTIGATION

21. (*Inv*) With regard to the investigation:

    i. Why were you delegated to conduct investigations?
    ii. What experience have you had in investigations?
    iii. How many?
    iv. Please tell me how you went about it?
    v. What information did you collect?
    vi. Did you feel well prepared to do the investigation?
    vii. Do you consider that you have been provided with adequate investigation skills/resources for investigating both the initial reports of wrongdoing and any allegations of reprisals? Are those skills formal internal/external courses? Do you get, for example, a manual on how to conduct investigations?

22. What is your view of how well your organisation undertakes the investigation of reports of wrongdoing?
23. When your organisation has to deal with a report of wrongdoing, from where (else) does it usually source investigations expertise:

    i. Line-managers;
    ii. In-house investigators (are any former police?)
    iii. Investigators who are contracted?
    iv. Other?

24. *Inv*) Do you consider that the organisation provides adequate resources to investigating reports of wrongdoing?
25. How many staff are specifically dedicated to investigations?
26. When reports of wrongdoing have been investigated, do you consider the organisational response to dealing with the issues raised is usually adequate?
27. Is the organisational response any different when an external integrity agency conducts the investigation and raises issues?
28. (*Inv*) In your organisation, to what degree are the investigation function and the support function relating to the reporting of wrongdoing separated?
29. (*Inv*) Are investigations of wrongdoing subject to reviewed or quality assessed?
30. (*Inv*) With regard to the progress and outcome of investigations, how are staff who initially reported kept informed? How are line-managers who pass on reports of wrongdoing kept informed? How are senior managers kept informed?

## 3. SUPPORTING AND PROTECTING REPORTERS

31. How effective do you think the support mechanisms in your organisation are for the protection and support for people who come forward with reports of wrongdoing?
32. Is the situation any different for people who report to an external integrity agency?
33. Are you aware of staff who may have left the organisation after a reporting incident and because of how they feel about that incident?
34. Our survey of employees indicated that 22% who had reported wrongdoing believed that they had been treated badly as a result of the experience. That bad treatment included reprisals. What do you think is the bigger challenge – preventing active reprisals against someone who reports, or dealing with the general stress and fall-out from the experience of reporting? Why?
35. How effective do you think the mechanisms in your organisation are for the encouraging staff members who have suffered some form of reprisal after reporting wrongdoing to achieve closure and get on with their careers?
36. How would you describe the way in which responsibility is shared for the support and management of whistleblowers between line managers, corporate management and external agencies?
37. (*Sup*) Do you consider that there are adequate resources dedicated to protecting and supporting people that come forward with reports of wrongdoing?
38. How many staff are specifically dedicated to protecting and supporting people that come forward with reports of wrongdoing?
39. (*Sup*) How effective do you think the mechanisms in your organisation are for the identifying risk of reprisal for people who come forward with reports of wrongdoing? [NB here you can go in knowing how the respondent answered QQ48-50 of the manager/case handler survey]
40. (*Sup)* Do you consider you have been provided with adequate counselling skills to support people who come forward with reports of wrongdoing?
41. What more could/should be done?

Griffith UNIVERSITY

**Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations, ARC Linkage Project**

# Consent Form

In signing this consent form I confirm that I have read and understood the information package provided to me and in particular have noted that:

1. I understand that participating in the research project will involve my participation in a semi-structured interview which will be recorded and transcribed, and that the transcription will be kept in a secure environment.

2. I understand that the interview will be conducted as described in the Information Sheet provided to me.

3. I authorise the researcher and other members of the research project to use the transcript of my interview for the purpose of the research project.

4. I understand that I am free to withdraw from the interview and the project at any time without explanation or prejudice and to withdraw any unprocessed data previously supplied.

5. I understand that the confidentiality of the information I provide will be safeguarded, subject to any legal or other regulatory authority requirements.

6. I understand that I will not be identified in any written publication or presentation of the results of this project.

7. I consent to the interview being recorded. I understand that only the research team will have access to the recording and that the recording will be erased following transcription.

8. I understand that I can contact the Manger, Research Ethics at Griffith University Human Research Ethics Committee on 3735 5585 (or research-ethics@griffith.edu.au) if I have any concerns about the ethical conduct of the project.

……
Name

……
Signature

……
Date

**Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations, ARC Linkage Project**

*A national study conducted by researchers from Griffith University, the University of Sydney, the University of Queensland, Charles Sturt University, Edith Cowan University as well as several public sector integrity organisations, including Ombudsman offices and various anti-corruption bodies. The project is funded by the Australian Research Council and has been approved by the Griffith University Research Ethics Committee.*

# INFORMATION SHEET

This sheet contains information regarding the interview which you have agreed to participate in for the above named research project.

The research team is intending to interview those persons who have either reported or provided information about wrongdoing in public sector workplaces. You have self identified as one of those persons and have expressed an interest in being interviewed.

The purpose of the interview is to learn more of your experiences as one of those persons and your views on reporting and providing information about wrongdoing.

Your participation in the interview is completely voluntary. If you have any questions or concerns at any time, either before or during the interview, please do not hesitate to speak with one of the Project Directors listed below or stop the interview and talk about matters with the interviewer.

The interview will be audio taped. The interviewer will ask a series of open ended questions that will afford you an opportunity to tell your story. After the interview is conducted the audio tape will be transcribed. A copy of the transcription will be forwarded to you and you will be asked to indicate whether it is an accurate account of the interview.

All interviews will be conducted in a manner so as to protect, as much as possible, your anonymity. This will be done by not recording any identifying particulars (ie neither your name nor any personal information will be mentioned during the recording). The interview transcript will be maintained and analysed in a de-identified form. The interview transcript will be kept in a secure environment and only those persons working on the project will have access to the transcripts.

Recalling significant events, that may or may not be distressing, can be emotionally draining and cause a person to experience discomfort. Should this occur, as a result of the interview, you may wish to seek assistance from a qualified counsellor. Attached is a list of counselling and support services that may assist you. The list also provides details of those agencies that are able to receive complaints of public sector wrongdoing.

It is anticipated that the project will be completed in early 2009. Reports will be published and will be made available on the project website

www.griffith.edu.au/centre/slrc/whistleblowing . If you are unable to access the internet please contact one of the Project Directors listed below and arrangements will be made to provide you with a copy of any of the reports.

A workshop is scheduled to be held sometime in 2008 where interview participants will receive feed back on the results of the research. It will also provide a forum for participants to debrief on the interview. If you are interested in attending a workshop please indicate so at the bottom of the consent form.

It is important for you to know if you have any concerns regarding the research and how it is conducted you are encouraged to contact the Project Directors directly or email them. If however, you wish to speak to a person that is independent to the research project then please contact Griffith University's Research Ethics Officer, Office for Research, Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111, telephone (07) 3875 6618; or Pro vice-Chancellor (Administration), Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111, telephone (07) 3875 7343.

## Project Directors

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## Privacy Statement

The following statement is a requirement of Queensland Information Standard 42 released under the Queensland *Financial Administration and Audit Act* 1977.

> *The conduct of this research involves the collection, access and/ or use of your identified personal information. The information collected is confidential and will not be disclosed to third parties without your consent, except to meet government, legal or regulatory authority requirements. A de-identified copy of this data may be used for other research purposes. However, your anonymity will at all times be safeguarded. For further information consult the university's privacy plan at www.griffith.edu.au/ua/aa/vc/pp or telephone (07) 3735 5585.*

# New South Wales - Contacts for Assistance & Support

**Making a Complaint or Getting Advice:**

**NSW Ombudsman**
http://www.ombo.nsw.gov.au/complaints/whatcancomplainabt.html
Ph: 02 9286 1000 in Sydney, or 1800 451 524 toll free outside Sydney metro
Email: nswombo@ombo.nsw.gov.au
Online form:
http://www.ombo.nsw.gov.au/complaints/onlinecomplaintform.html

**NSW Independent Commission Against Corruption**
http://www.icac.nsw.gov.au/index.cfm?objectid=E26DE6C1-D0B7-4CD6-F9BAD62B8F55DD1A
Ph: 02 8281 5999 in Sydney, or toll free 1800 463 909 outside Sydney metro
Fax: 02 9264 5364
Download complaint form:
http://www.icac.nsw.gov.au/index.cfm?objectid=F026FFF3-B6E7-28C2-35705C6A33CEA745

**List of other complaint handling bodies**
http://www.ombo.nsw.gov.au/complaints/complainhandlinbod.html

**Support and Self Help Services:**

**Whistleblowers Australia**
http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/info.html
Sydney contact ph: Cynthia Kardell 02 9484 6895 or 02 9810 9468 (messages)
Goulburn contact ph: Rob Cumming 0428 483 155
Wollongong contact ph: Brian Martin 02 4221 3763
Contacts website and information about meetings:
http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/contacts.html

**Support & Counselling Services:**
Lifeline:
Lifeline provides 24-hour telephone counselling services with a national accessible number for the cost of local call. If you are feeling low, depressed or suicidal, or worried about a friend or family member and need immediate help, please ring:
Phone: 13 11 14
http://www.lifeline.org.au/
Employee Assistance Program:
Contact your agency to find out what service provider your agency uses.
Psychological counselling:
The following website enables a search for a psychologist in your area with access to over 1,500 psychologists Australia wide, who are in private practice and provide services for a fee. This listing is not a directory of all APS Members.

http://www.psychology.org.au/psych/referral_service/Default.aspx

# Queensland - Contacts for Assistance & Support

**Making a Complaint or Getting Advice:**

**Qld Ombudsman**
http://www.ombudsman.qld.gov.au/cms/index.php?option=com_content&task=view&id=18&Itemid=16
Contact details:
Ph: 07 3005 7000 in Brisbane, or 1800 068 908 toll free outside Brisbane
Email: ombudsman@ombudsman.qld.gov.au
Online form:
http://www.ombudsman.qld.gov.au/cms/index.php?option=com_bb_complaint_form&Itemid=18

**Office of Public Service Merit & Equity**
http://www.opsme.qld.gov.au/ethics/whistleblowing.htm
Contact details:
Ph: 07 3224 6663

**List of other complaint handling bodies**
http://www.ombudsman.qld.gov.au/cms/index.php?option=com_content&task=view&id=44&Itemid=43

**Support and Self Help Services:**

**Whistleblowers Australia**
http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/info.html
Contact details:
Ph: Feliks Perera 07 5448 8218
Whistleblowers Action Group ph: Greg McMahon 07 3378 7232 (AH)
Contacts website:
http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/contacts.html

**Support & Counselling Services:**
Lifeline:
Lifeline provides 24-hour telephone counselling services with a national accessible number for the cost of local call. If you are feeling low, depressed or suicidal, or worried about a friend or family member and need immediate help, please ring:
Phone: 13 11 14
http://www.lifeline.org.au/

Employee Assistance Program:
Contact your agency to find out what service provider your agency uses.

Psychological counselling:
The following website enables a search for a psychologist in your area with access to over 1,500 psychologists Australia wide, who are in private practice and provide services for a fee. This listing is not a directory of all APS Members.

http://www.psychology.org.au/psych/referral_service/Default.aspx

# Western Australia - Contacts for Assistance & Support

**Making a Complaint or Getting Advice:**

**WA Ombudsman** - to find out if this is the right service for you first visit:
http://www.ombudsman.wa.gov.au/whowhat/index.phtml
Contact details:
Email: mail@ombudsman.wa.gov.au
Ph: 08 9220 7555 for assistance - but note complaints must be in writing
Online form: http://www.ombudsman.wa.gov.au/submitting/complaintform.phtml

**Corruption and Crime Commission**
http://www.ccc.wa.gov.au/complaints_about.php
Contact details:
Ph: 08 9215 4888 and ask for the Complaints Assessment Unit, or toll free 1800 809 000
Email: info@ccc.wa.gov.au
Download complaint form: http://www.ccc.wa.gov.au/pdfs/complaint-form.pdf

**Support and Self Help Services:**

**Whistleblowers Australia**
http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/info.html
For general information/support visit:
http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/committee.html

**Support & Counselling Services:**
Lifeline:
Lifeline provides 24-hour telephone counselling services with a national accessible number for the cost of local call. If you are feeling low, depressed or suicidal, or worried about a friend or family member and need immediate help, please ring:
Phone: 13 11 14
http://www.lifeline.org.au/

Employee Assistance Program:
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